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ALEXANDER L. STEVAS,

80-2152

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI, et al.,
Petitioners,

v.

CRATON LIDDELL, et al.,
and,
EARLINE CALDWELL, et al.,
and,
JANICE ADAMS, et al.,
and,
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al.,
and,
THE CITY OF ST. LOUIS, MISSOURI,
and,
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June, 1981

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I

QUESTIONS PRESENTED

1. Whether the effectiveness of a 1954-1956 desegregation plan can be judged on the basis of the number of predominately black schools existing in a system in 1962 in view of the fact that (1) there are no statistics regarding racial composition of the schools for the intervening years and (2) the racial composition and distribution of the district as a whole had changed drastically in the interim?

2. Whether State liability for an alleged failure to disestablish a dual school system can be premised on the State being an absolute guarantor that political subdivisions will afford equal protection of the law, where (1) the State had removed all legal impediments at the State level to effect of dismantling of the dual school system, (2) the State had not controlled, directed or participated in the actions of the local school board, and (3) the State had not been shown to have exercised or failed to exercise its own authority in an unconstitutional manner?

3. Whether a finding of intradistrict liability on the part of the State can, consistent with *Milliken* v. *Bradley*, support an order to bear the cost of and participate in a plan of voluntary pupil exchanges with nonparty school districts?

4. Whether an order of mandatory interdistrict relief can be premised upon a finding of fact not within the scope of any pleadings in the case and not tried by the consent of the parties?

5. Whether a district court can order the preparation of a mandatory interdistrict plan when allegations of interdistrict violations are not present in any of the pleadings, no hearing has been held with regard to any such issues, and no findings have been made thereon?

LIST OF ALL PARTIES

1. The State of Missouri; Christopher S. Bond, Governor of the State of Missouri; Mel Carnahan, Treasurer of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Stephen C. Bradford, Commissioner of Administration; Arthur L. Mallory, Commissioner of Education; State Board of Education; Delmar A. Cobble, Grover Tamm, Jimmy Robertson, Dale M. Thompson, Ervin A. Williams, Donald W. Shelton, and Robert Welling, Members of the State Board of Education.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, the State of Missouri, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 3, 1980, reversing the judgment of the United States District for the Eastern District of Missouri entered on April 12, 1979, and the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 13, 1981, affirming the judgment of the United States District Court for the Eastern District of Missouri entered on May 21, 1980.

OPINIONS BELOW

The opinions of the District Court are reported at 469 F.Supp. 1304 (E.D.Mo. 1979) and 491 F.Supp. 351 (E.D.Mo. 1980). The first opinion of the United States Court of Appeals for the Eighth Circuit is reported at 620 F.2d 1277 (8th Cir. 1980). The second opinion of the Court of Appeals is as yet unreported, but is reprinted herein as Appendix A. A copy of the order of the United States Court of Appeals for the Eighth Circuit denying the petitions for rehearing is printed herein as Appendix B.

JURISDICTION

The most recent judgment and mandate of the Court of Appeals was filed on March 19, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a school desegregation case which was initially filed in 1972 by the Liddell group of plaintiffs against the St. Louis Board of Education, its members, and certain named administrators. The Liddell plaintiffs and the City

Board of Education entered into a consent decree which was approved by the District Court on December 24, 1975. In January of 1976 objections to the proposed consent decree were filed by a second group of black parents, the Caldwell plaintiffs, who were joined by the St. Louis chapter of the NAACP. At this time the Caldwell group also moved to intervene as party plaintiffs. The District Court's denial of the motion to intervene was reversed by the United States Court of Appeals for the Eighth Circuit. *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976).

Following the remand by the Court of Appeals, the United States, the City of St. Louis, and the Adams group were allowed to intervene as plaintiffs. Also during 1977 the State of Missouri, the Commissioner of Education of the State of Missouri and the State Board of Education and its individual members were added as defendants.

Following a trial on the merits the District Court handed down its decision on April 12, 1979, and found that the St. Louis City Board of Education had disestablished the former dual school system. *Liddell* v. *Board of Education, City of St. Louis*, 469 F.Supp. 1304 (E.D.Mo. 1979). The United States Court of Appeals for the Eighth Circuit reversed and found that the formerly mandated dual school system had not been disestablished. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980). The Adams plaintiff petition for writ of certiorari was denied. *Adams* v. *United States*, ___ U.S. ___, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

Following the remand by the Eighth Circuit the St. Louis Board of Education submitted its plan for desegregation of the public school. After several days of hearings in May of 1980 the District Court approved the plan in an order entered May 21, 1980 and filed Findings of Fact and Conclusions of Law on June 3, 1980. *Liddell* v. *Board of Education, City of St. Louis*, 491 F.Supp. 351 (E.D.Mo.

1980). In the course of the findings and order the District Court concluded that the State of Missouri was the primary constitutional wrongdoer and directed the State of Missouri to fund one-half of the desegregation plan up to approximately $11-million. The District Court also directed the State defendants, the United States and the St. Louis Board of Education to develop a plan for voluntary, cooperative pupil exchanges with the school districts of St. Louis County; to develop a plan for the consolidation and merger of the separate vocational educational programs of the Special School District of St. Louis County and the School District of the City of St. Louis; and to develop and submit to the court a suggested plan of interdistrict desegregation necessary to eradicate the remaining vestages of government-imposed school segregation in the City of St. Louis and St. Louis County. *Id.* at 353. The judgment of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit in an opinion entered on February 13, 1981. A copy of the opinion, as yet unreported, is printed herein as Appendix A. Petitions for rehearing were denied by the Court of Appeals on March 19, 1981. A copy of the order denying the petitions for rehearing is printed herein as Appendix B.

During the pendency of the appeal to the Court of Appeals, the Caldwell plaintiffs and the City Board of Education filed motions for leave to amend their pleadings to add some forty school districts as additional defendants and to assert claims for interdistrict relief. The District Court has not yet ruled upon these motions to amend.

Modifications to paragraphs 12(a) through 12(c) of the May 21, 1980 order were made by orders entered by the District Court on September 17, 1980 and December 19, 1980. These orders are printed herein as Appendices C and D. In an order entered on March 4, 1981, the District Court directed the State defendants to prepare another plan

for a voluntary pupil exchanges pursuant to paragraph 12(a) of the District Court's May 21, 1980 order. This order is printed herein as Appendix E. On June 11, 1981 the District Court entered an order for the implementation for the plan for vocational education. See Appendix F.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals below applied an improper standard in determining the effectiveness of a 1954 desegregation plan implemented by the School Board of the City of St. Louis, in that the comparison of racial composition of pre-Brown schools with the number of predominantly black schools in 1962 is inherently unreliable because (1) there were massive population shifts within the City of St. Louis in the interim and (2) there was an absence of comprehensive racial data in the schools for the interim period such that the continuity of racial composition in the schools cannot be established but that what evidence there is does not corroborate the existence of such continuity.

Prior to 1954 the schools of the State of Missouri were admittedly segregated by race pursuant to a constitutional provision. However, even prior to this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), the Board of Education of the City of St. Louis began preparation for the institution of a desegregated system. Thus on June 22, 1954 the Board of Education adopted a plan for the desegregation of the St. Louis public school system. The plan was to be completely effective over the period of 1954 through 1956.

The essence of the desegregation plan adopted was the assignment of all students to neighborhood schools. To accomplish the elimination of overlapping attendance zones for black and white students, new attendance zones

were drawn by use of IBM cards which contained the number of students and their grades for each city block in the city. Names, addresses, and any racial data for these students was not available in this process. In fact, since race was eliminated as a criterion for admission or assignment in the public schools, any reference to race was excluded from the records of the school system until 1962 when a racial count was taken pursuant to the recommendation of the United States Commission on Civil Rights. The new attendance zones were based on capacity of the individual school buildings, the distance of students from the buildings and the safety of the children, such as avoiding dangerous intersections.

The Board of Education provided that students who were already attending a school would have the option of continuing in that school if the redistricting had placed them in another attendance zone. This option would last only so long as the child attended that school and when he moved on to the next level of schooling the student would be required to attend the school in the appropriate attendance zone. This provision was simply a continuation of a previous policy under which a child could continue at a particular school even if his residence had changed.

The District Court initially concluded that this plan succeeded in effectively disestablishing previously mandated dual system in the City of St. Louis. *Liddell* v. *Board of Education, City of St. Louis*, 469 F.Supp. 1304 (E.D.Mo. 1979). The United States Court of Appeals for the Eighth Circuit reversed this finding and concluded that the dual school system had not been disestablished. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980). Because racial data was not kept between 1954 and 1962, there is only spotty evidence regarding the racial composition of the St. Louis public schools in the interim. The Court of Appeals' conclusion is premised strongly on the fact that in 1962, when

records on racial composition were again kept, all twenty-eight (28) of the formerly black elementary schools still in existence were virtually all black and that fifty (50) of the formerly white schools remained eight-five percent or more white. *Id.* at 1291.

This use of 1962 statistics, however, presumes a continuity of the racial composition of the schools in question. Petitioners believe that such presumption is completely unwarranted. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 472 (1979) (separate opinion of Mr. Justice Stewart).

Not only is any presumption of continuity logically unsound, but it is unsound in view of the particular facts of the St. Louis situation. The period of 1954 through 1962 was one of widespread demographic change within the City of St. Louis. From 1950 to 1960 the white population in the City of St. Louis declined over 160,000, while black population increased by over 60,000. The public school system lost over 10,000 white students and gained over 29,000 black students. As a result, the system went from being thirty-five percent black in 1954 to fifty-five percent black in 1962.

Not only was this a case of a simple increase in the percentage of blacks in the City population as well as the public school population, but there was a widespread movement of blacks within the city itself. *Liddell* v. *Board of Education, City of St. Louis, supra* at 1319. Fifty percent of the black population moved out of older black areas. As a result, not only were the previously black schools predominantly black in 1962 but thirty-six previously all white schools had become over ninety percent black by 1962. The District Court concluded because of the rapid demographic changes, the previously black schools, even though predominantly black in 1962, were not vestiges of the dual system. The District Court found that previously

white schools in the same area as the alleged "vestige" schools had experienced a racial inversion to predominantly black. *Liddell* v. *Board of Education, City of St. Louis, supra* at 1329 through 1330.

The Court of Appeals stated that the City Board could have redrawn the boundaries to include significant numbers of white students in formerly all black schools, without sacrificing the neighborhood concept. Presumably if the City Board had done this, the dual system would have been considered disestablished. The question which needs to be asked, however, is whether such an action by the City Board would have had any measurable effect upon the composition of the schools in 1962.

The petitioners believe that there is no reasonable basis from which it could be concluded that a "better" redistricting in 1954 would have been able to withstand the demographic changes which the City of St. Louis was undergoing. Petitioners believe, however, that in order for schools in 1962 to be considered vestiges of the dual system, it must be found that the actions of the Board in 1954 would have made some appreciable difference in the 1962 composition. No such finding has been made and without such a finding there would be a total absence of causality.

The Court of Appeals stated that the 1962 racial figures were corroborative of what evidence there was concerning the immediate effect of the 1954 desegregation plan. The Court of Appeals first refers to 1955 "projections" which indicated that forty-six of the eighty-three previously white elementary schools would have an all white student population. In the remaining thirty-seven schools the black population would range from fifty-six percent to less than one percent. The "projections" also indicate that twenty-seven of the forty formerly black schools would remain all black and that in the remaining thirteen the number of white

students would range from eighteen percent to less than one percent.

Several factors need to be taken into account in assessing this material. First, it must be remembered these are "projections". Second, these estimates are based upon a check of parental choices in the spring of 1955. Thus, the estimates would take into account a parent's preference for use of the continuation transfer provision. The figures do not indicate, however, the normal racial composition of the new attendance zones. Third, the testimony indicated that these estimates were revised upward, apparently because not all parents were able to take advantage of their preference for the continuation transfer. In order for a continuation transfer to be effective, there had to be space available in the school previously attended and the student had to provide his own transportation. Thus, the testimony was that as implemented at least two thirds of the elementary school population in the City of St. Louis was attending racially mixed schools during the first year. Finally, the effect of the continuation transfers would diminish as the years passed because students would no longer be eligible for them as they graduated from the particular school they had attended.

Similar factors undercut the Court's reliance on the first year high school figures. We do know that 40% of the black students assigned to new schools chose to attend the previously all black high schools. The absence of whites in these schools can also be accounted for by the continuation option because as Appendix II to the Eighth Circuit's opinion shows, the attendance zones for the formerly black high schools, while heavily black, were racially mixed. *Adams* v. *United States, supra* at 1299.

It is well established that there is no constitutional right to any particular racial balance in public schools.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1(1971). Thus, viewing the St. Louis public school *system*, petitioners believe that not only did the City Board establish procedures to ensure that students would be admitted to schools on a racially nondiscriminatory basis but that this policy did lead to a substantial degree of racial mixture. Certainly no student was excluded from any school because of his race as indicated by the rapid racial inversion of many formerly all white schools. The Board's policy, therefore, not only reflected the composition of existing neighborhoods but, more importantly, changes therein. *Goss* v. *Board of Education, City of Knoxville, Tennessee*, 340 F.Supp. 711 (E.D.Tenn. 1972), *aff'd* 482 F.2d 1044 (6th Cir. 1973), *cert. den'd* 417 U.S. 1171 (1974).

In order for the City Board to have met the standards of the Court of Appeals in 1962, it would have been required to make yearly adjustments in its assignments of students. Such yearly adjustments are not required and are beyond the jurisdiction of a federal court to order. Thus, to base the question of effectiveness of the 1954 plan to a large degree on the racial composition of the schools in 1962 would be to require what the District Court or Court of Appeals could not have ordered directly. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

Thus, the racial composition of the schools in 1962 is not relevant to the question of whether the Board's 1954 plan was effective. Rather, the composition of the schools in 1962 is primarily relevant to the City Board's evidence that the schools were resegregated through demographic changes. Here, however, the Court of Appeals totally misconceived the proper mode of analysis of this evidence. The Court of Appeals stated that they took this into account in determining the appropriate remedy. *Adams* v. *United States, supra* at 1291. Petitioners respectfully suggest that

this evidence is not primarily related to the appropriate remedy. Rather, the evidence of resegregation and demographic changes is relevant to the question of whether or not racial imbalance in 1962 and afterwards is a vestige of the previously dual school system. By considering this evidence only on the question of remedy, the Court of Appeals in effect denied the City Board a chance to prove that later racial imbalance was a result of other factors, rather than the dual school system. It is interesting to note that the desegregation plan approved in *Goss, supra,* was virtually identical to that which the St. Louis Board of Education adopted *without court order 36 days after this Court's decision in Brown.* The court in *Goss* declared the Knoxville school system unitary. The primary difference between St. Louis and Knoxville seems to be that Knoxville had a relatively stable black population, while St. Louis did not.

The Court of Appeals simply never recognized that a dual school system may be disestablished by natural social forces as much as by any deliberate action of a governmental body. The crucial question which the Court of Appeals adroitly avoided is whether or not the St. Louis school system would be any different today if there had been an effective dismantling as the Court of Appeals implied could have been done in 1954.

The Court of Appeals' analysis of these complex issues is both hasty and shallow. However, indications of the Court of Appeals' haste to decide this case were present as early as 1976 when this case was before the Court of Appeals for the sole purpose of deciding whether or not additional parties should be permitted to intervene. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976). In the course of that decision the Court of Appeals stated:

> "The parties were faced with an admittedly *de jure* segregated school system . . ." *Id.* at 772.

> "In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term." *Id.* at 774.

The above statement clearly assumes, prior to any trial on the merits, that the St. Louis school system was not unitary. In short, the Court of Appeals in its rush to reverse the District Court and to reaffirm its own opinion of four years previously, employed a totally inaccurate test of the effectiveness of the desegregation plan, and in effect, denied the City Board a proper consideration of its defense.

II.

The Court of Appeals' finding of liability against the State of Missouri is erroneous because (1) it is contrary to Due Process, (2) is based upon legal principles so vague as to be virtually incomprehensible and render the State a virtual guarantor that its political subdivisions obey constitutional commands, without any finding of direct participation at the State level and, (3) to the extent that the finding of liability requires the State of Missouri to fund a specific level of the desegregation plan, it far exceeds the permissible relief available without a finding of participation by State officials.

The role of the State of Missouri in this litigation over the years has admittedly been fraught with confusion as a result of the procedural morass which has developed. Neither the State of Missouri nor any State officers were named defendants when this action began in 1972. The State of Missouri, the State Board of Education and the State Commissioner of Education were added as party defendants in July 1977 after the case had been remanded from the Court of Appeals with direction to order the intervention of another class of plaintiffs represented by the NAACP. (The other State defendants were added in 1980, after judgment). Even though named as defendants, no complaint

was ever filed against the State or its officers. The first complaint was actually filed in June of 1980 after the trial on the merits, the decision by the District Court, and the reversal and remand by the Court of Appeals. The purpose of the amended complaint against the State was ostensibly to conform to the issues tried by consent. Since there was no complaint against the State to begin with it is highly questionable whether the complaint was properly filed after judgment. There were no pleadings against the State to be "realigned." *Cole* v. *Layrite Products Company*, 439 F.2d 958 (9th Cir. 1971). The petitioners, therefore, had no opportunity to defend in any meaningful manner because they had no notice of any particular allegations against them. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). As pointed out *infra*, most cases discussing State liability do so on the basis of specific evidence of State involvement. The petitioners reasonably expected it would be the same here.

In any event, following the trial on the merits the District Court found that the State of Missouri promptly repealed statutes implementing its constitutional provision and later passed legislation outlawing discrimination in public accommodations, which included schools. *Liddell* v. *Board of Education, City of St. Louis*, 469 F.Supp. 1304, 1313-1314 (E.D.Mo. 1979).

In its opinion on the appeal from the District Court's decision, the Court of Appeals had no discussion at all concerning State liability. The Court of Appeals remanded for implementation of a desegregation plan.

Following a *remedy* hearing the District Court entered an order on May 21, 1980, which ordered the State to fund one-half of the desegregation plan up to approximately eleven million dollars. *Liddell* v. *Board of Education, City of St. Louis*, 491 F.Supp. 351, 353 (E.D.Mo. 1980).

On June 3, 1980, the Court entered Findings of Fact

and Conclusions of Law, which found that the State "never took any effective steps to dismantle the dual system . . ." *Id.* at 357. As a matter of law the Court then concluded that the State Defendants were the "primary constitutional wrong-doers."

On appeal from this decision, the State Defendants urged that the Court of Appeals had not reversed the District Court's earlier finding of nonliability on the part of the State and that therefore the District Court was without jurisdiction to make any new findings with regard thereto. The Court of Appeals rejected this argument as follows:

> "This contention is wholly without merit. In our March 3 opinion, we spjecifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams* v. *United States, supra,* 620 F.2d at 1295 n.28. These statements amount to a *clear reversal* of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. . . ." (Appendix A at 22) (Emphasis added).

The State Defendants submit that any reasonable reading of the Court of Appeals first opinion will not demonstrate the existence of a "clear reversal" on the issue of State liability. Following the direction to apportion costs the Court referred to Part VI of its Opinion. Part VI, however, did not deal with any failure to disestablish the dual school system in the City of St. Louis which was the basis of the District Court's finding of liability. Rather, Part IV simply refers to other segregative factors which intensified

racial segregation. If the Court of Appeals intended to find the State Defendants liable on this basis, the District Court certainly did not do so. In addition, it would be stretching the rules of procedure to the breaking point to assert that the State Defendants had any sort of notice at all that their liability was going to be grounded on something other than educational policy. It is interesting to note that when other parties pressed for a finding of liability against the United States, the United States argued that the language of Part VI of the Opinion of the Court of Appeals was an insufficient finding as to liability.

Further, the simple direction to apportion costs contained in the footnote conflicted with some more specific directions in the Court's Opinion. For instance, after discussing pupil reassignments the court directs that the City Board should use other techniques and "shall seek the help of the state and federal governments in financing." *Adams* v. *United States, supra* at 1296. This specific direction does not give any indication of potential state liability to fund one-half of the desegregation plan, up to approximately eleven million dollars. The State Defendants submit that if there was a reversal of the District Court's finding on the issue of State liability it was of such an obscure nature that it fully explains why the State defendants did not seek relief in this Court earlier.

Initially it should be noted that in single district desegregation cases the state involvement has not as a general rule been discussed. Where there has been some state involvement, the courts have always examined the evidence specifically implicating the state as opposed to that against a local board. The State of Missouri, however, has not been found to have committed any affirmative action to hinder or circumvent desegregation. *Griffin* v. *School Board of Prince Edward County,* 377 U.S. 218 (1964). *Cooper* v.

Aaron, 358 U.S. 1 (1958). *Norwood* v. *Harrison*, 413 U.S. 455 (1973). Instead, the State of Missouri repealed all of its statutes which had implemented its constitutional provision. It enacted legislation prohibiting discriminaton in public accommodations, which statute included schools and established an administrative procedure to enforce that prohibition. Thus, the State of Missouri did not simply just abandon its previous policy of segregation, it affirmatively prohibited it and provided an administrative remedy, in addition to whatever judicial relief would be available to enforce the statutory prohibition. In this day and age no state can act as an absolute guarantor that any of its citizens will not be subject to discrimination of one sort of another, even at the hands of political subdivisions of the state. Petitioners submit, however, that the State meets its affirmative obligations under the Fourteenth Amendment by providing a remedy for any such violation. In the related area of deprivation of property without due process of law, it has been held that a state does not violate the Fourteenth Amendment as long as it provides a remedy for any such deprivation that takes place. *Parratt* v. *Taylor*, No. 79-1734 (49 U.S.L.W. 4509, May 18, 1981). In the instant case, however, the effectiveness of the plan instituted by the City Board was not challenged for eighteen years.

Even if the State Board of Education had promulgated and enforced general guidelines on desegregation, the question becomes what would have been the result of any of these policies. To all appearances the School Board of the City of St. Louis had completely disestablished its dual system by 1956. *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955), indicated only that school districts should admit students on a nonracial basis. Further, courts had approved the development of neighborhood attendance zones, the very manner in which the St. Louis City Board had chosen to

meet this Court's mandate under *Brown II*. The fact that racial imbalance might have remained would not have been enough to put any State official on notice that any further action was required. In *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (8th Cir. 1966), the court acknowledged that the constitutionality of a plan did not depend upon favorable statistics indicating positive integration of the races and approved neighborhood schools. See also *Kemp* v. *Beasley*, 389 F.2d 178 (8th Cir. 1968).

In *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), this Court indicated that a school district would have to do more than allow students of one race to attend schools previously designated for the other. The St. Louis City Board, however, had already done much more than that. Even following this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), a plan almost identical to that adopted by the City Board was approved. *Goss* v. *Board of Education, City of Knoxville, Tennessee*, 340 F.Supp. 711 (E.D.Tenn. 1972), *aff'd* 482 F.2d 1044 (6th Cir. 1973), *cert. den'd* 414 U.S. 1171 (1974). Thus, at least up until the time this lawsuit was filed, there is really nothing to put State officials on notice that the plan adopted by the City Board was ineffective. The evidence in this case indicates that the State of Missouri took the necessary and appropriate steps to remove the legal underpinnings of segregated schooling as well as affirmatively prohibiting such discrimination. The evidence fails to establish that State officers exercised or failed to exercise their authority in a manner inconsistent with constitutional obligations.

The issue of State liability, therefore, resolves itself into a conclusion that because the City School Board was found to have failed to dismantle the dual system, the

State is automatically liable. Because all previous cases which have discussed the issue of State liability have specifically discussed and considered the evidence as it related to State activities either hindering or opposing desegregation, the foregoing basis of State liability stands out as unique. Petitioners submit, therefore, that such a radically new standard of State liability should be considered by this Court.

Assuming *arguendo* that there is some basis for a finding of State liability, the question becomes whether a specific decree ordering the State to fund one-half of the desegregation plan is authorized by such a finding.

Significant State involvement was mound in *Bradley* v. *School Board of City of Richmond, Virginia*, 338 F.Supp. 67 (E.D.Va. 1972). Although that decision was ultimately reversed, *Bradley* v. *School Board of City of Richmond, Virginia*, 462 F.2d 1058 (4th Cir. 1972), *aff'd* 412 U.S. 92, it is interesting to note that in formulating its relief the state officials were simply directed to take certain actions which the district court considered necessary for effective desegregation. There was no blanket assessment of liability for any particular monetary amount. The state and the state officials were left free to determine how best and most effectively to comply with the district court's order.

Petitioners believe that the District Court's order requiring the State to pay one-half of the cost is an unwarranted intrusion upon the State appropriation process. As Mr. Justice Powell noted in *Milliken* v. *Bradley*, 433 U.S. 267, 295 (1977):

> "Ordinarily a federal court's order that a State pay unappropriated funds to a locality would raise the gravest constitutional issues. . . ."

Petitioners believe those issues are raised in this case and that the factual basis which justified the imposition of

the order aganst the State of Michigan simply do not exist in the instant case. Even assuming *arguendo* that there is a basis for State liability the District Court could order the State and State officers as well as the City Board, what they need to do in order to meet their constitutional obligation. This would not necessitate any specific order or provision relating to funding. As the NAACP noted in one of their earlier briefs in this case, "[t]o a large extent, how a state fulfills its constitutional duty is its own business." The petitioners respectfully suggest that State officers are the best judge of how best to meet whatever a court determines to be their constitutional obligations, consistent with all of the other duties which are imposed upon them. For instance, the initial order by the District Court stated that the State funds should come out of the State surplus. At the time that order was entered the State of Missouri did indeed have a surplus. However, that situation changed rather rapidly and the state is now in a serious fiscal situation. Given the situation facing the State of Missouri at the present time, the petitioners believe that the State and its officers are in a better position than the District Court to make a judgment as to how that obligation can best be met.

Obviously the District Court was concerned about the successful implementation of a desegregation plan. However, this concern does not justify the specific order entered by the District Court. In *Evans* v. *Buchanan*, 582 F.2d 750, 779-780 (3rd Cir. 1978), the District Court had also been concerned that state funding would not be adequate to implement the desegregation order. In response, the Court of Appeals stated:

> "Our observation is that this overlooks the critical, and incontrovertible, proposition that any money budgeted by the State to the Northern New Castle

> County school system must be used by the NCCPBE, *first*, to effect the desegregation order, and then to meet the expenses of other programs. Put another way, it is the NCCPBE's responsibility to work with the money it has by attending first to all aspects of the remedial order, and then to other aspects of the school system's expenses. . . ." (Empasis in original).

Petitioners submit, therefore, that even if there is a basis for finding State liability, the District Court exceeded its authority in ordering the State to fund any particular portion of the desegregation plan.

III.

The District Court exceeded its authority in ordering the preparation of a plan of voluntary pupil exchanges between the St. Louis School District and nonparty school districts because (1) an interdistrict violation has neither been pleaded nor proven, and (2) the District Court cannot, consistent with Milliken **v.** Bradley, **order the State of Missouri to fund such a voluntary plan simply on the basis of an intradistrict violation.**

In paragraph 12(a) of its May 21, 1980 order, the District Court required the State defendants, the United States, and the St. Louis Board of Education to:

> "[M]ake every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis. . . ." *Liddell* v. *Board of Education, City of St. Louis,* 491 F.Supp. 351, 353 (E.D.Mo. 1980).

In their application for stay to this Court, the petitioners argued that such an order exceeded the District Court's

authority under *Milliken* v. *Bradley*, 418 U.S. 717 (1974). In the instant case, as in *Milliken*, there has not been a finding of any interdistrict violation involving the school districts of St. Louis County. The present litigaton has simply not been interdistrict in scope. This is rather empathically demonstrated by the fact that it was only in January of 1981, that the City Board and the NAACP sought leave to amend their pleadings, both to add forty additional school districts as parties and to state a claim for interdistrict violations. Throughout the course of this litigation, the general response to the petitioners' assertion that the District Court had exceeded its authority was simply that this was a "voluntary" plan, which could not be enforced. Appendix A at 15.

However, in response to the petitioners' application for stay to this Court, the NAACP stated that the State defendants may be required to participate in this "voluntary" plan. The District Court order of December 19, 1980, provides that the 12(a) plan will be primarily financed by the State. Appendix D. The issue thus becomes whether a finding of an intradistrict violation, by the State of Missouri, if upheld by this Court, can provide the support for an order to bear the costs of a plan of voluntary exchanges. The plaintiffs and the City Board apparently rely upon this Court's opinion in *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) for the proposition that such an order is permissible. The petitioners submit that *Hills* is distinguishable in several significant areas and that the plaintiffs and the City Board have completely misinterpreted its thrust.

With regard to the effect of *Milliken* upon the relief ordered by the Court of Appeals, this Court stated:

> "Nothing in the Milliken decision suggests a per se rule that federal courts lack authority to order parties found to have violated the Constitution to under-

take remedial efforts beyond the municipal boundaries of the city where the violation occurred. . . ." *Id.* at 298.

The petitioners submit, however, that neither is there a per se rule that justifies such a remedial order on the basis of an intradistrict violation even if participation by other governmental units is voluntary. As this Court noted in a footnote to the foregoing statement:

> "Although the State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, . . . the Court in Milliken concluded that the interdistrict order was a wrongful exercise of judicial power because *prior cases had established that such violations are to be dealt with in terms of 'an established geographich and administrative school system,'* . . ." *Id.* at 298 n.13. (Emphasis added).

Thus, the *Milliken* opinion, as well as that in *Hills*, recognizes that the history of desegregation litigation has established the normal scope of appropriate relief as a single school district and that this may be expanded only on the basis of an interdistrict violation, as defined in *Milliken*.

A further distinction between *Hills* and a school desegregation case, such as we have here, is that the issue is whether or not the remedy exceeds the violation which has been found. The court in *Hills* reaffirmed the principle that federal courts may act only "on the basis of a constitutional violation." *Id.* at 293.

The specific constitutional violation of whch the State of Missouri has, to date, been found guilty is the failure to disestablish its previously mandated dual school system in the City of St. Louis. The disestablishment of a dual school system does not necessitate reaching any particular degree of racial balance in schools. *Swann* v. *Char-*

lotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The fact that the plan approved by the District Court and affirmed by the Court of Appeals leaves a large number of black children in racially imbalanced schools does not in any sense imply that the intradistrict violation of which the State of Missouri has been found guilty has not in fact been remedied. *Calhoun* v. *Cook*, 525 F.2d 1203 (5th Cir. 1975). In *Hills* this Court concluded that the order against HUD did not exceed the nature of the violation found. There is not evidence to support the conclusion that remaining racial imbalance stems from any constitutional violation by the State of Missouri. The remedy proposed in paragraph 12(a), therefore, far exceeds the nature of the constitutional violation of which the State of Missouri has been found guilty.

Finally, this Court in *Hills* outlined possible forms that relief against HUD could take which would not overstep "the limits of judicial power established in the Milliken case." It should be noted that all of the suggested remedial actions did not entail a restructuring of HUD's activities. In other words, HUD was not ordered to operate in a geographical area it was not otherwise authorized to or to exercise powers which it did not in fact already exercise. The contemplated order would only provide more specific directions as to how HUD should exercise the powers it already possessed.

In the instant case, however, an order that the State of Missouri fund and participate in a voluntary interdistrict transfer plan would involve a major change in State operations. A voluntary plan under paragraph 12(a) of the District Court's order, would impose a major new financial burden upon State operations. As this Court noted in *Hills* the power to restructure the operation of both local and state governmental entities may be exercised only on the basis of a constitutional violation. To the extent that that

restructuring involves interdistrict operations not normally undertaken by the State of Missouri, it can be imposed only on the basis of an interdistrict violation as defined in *Milliken*. Petitioners submit, therefore, that the 12(a) voluntary plan ordered by the District Court far exceeds its permissible authority under both *Milliken* and *Hills*.

IV.

The District Court exceeded its authority and violated Due Process in paragraph 12(b) of its May 21, 1980 Order, in ordering a plan for the consolidation or merger and full desegregation of separate vocational educational programs operated by the Special School District of St. Louis County and the School District of the City of St. Louis because (1) such interdistrict relief was not encompassed within the scope of pleadings, and (2) there was no evidence to support the entry of such an order.

In paragraph 12(b) of its May 21, 1980, Order, the District Court ordered the State defendants, the United States, and the St. Louis Board of Education:

> "To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year." *Liddell* v. *Board of Education, City of St. Louis,* 491 F.Supp. 351, 353 (E.D.Mo. 1980).

The only finding underlying this Order was contained in paragraph 17 of the District Court's Findings of Fact and Conclusions of Law entered on June 3, 1980.

> "The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound nor administratively ef-

ficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." *Id.* at 358.

Since the petitioners filed their motion for stay of the Court of Appeals mandate in March of this year, the special school district of St. Louis County has engaged in negotiation with other parties and has arrived at a tentative consent decree which provides for the continued separate existence of the special school district but would provide for voluntary joint programs between it and the St. Louis City school system. The District Court did not formally approve the consent decree but entered an order incorporating its basic provisions and providing for funding by the State beyond what it consented to. The Court has, therefore, imposed a mandatory interdistrict remedy. Appendix F.

As initially ordered, paragraph 12(b) of the District Court's Order called for a mandatory interdistrict remedy justified neither by the pleadings nor the evidence up to the time of its entry.

The petitioners asserted on appeal that the entry of this Order was beyond the jurisdiction of the District Court to enter. This argument was effectively ignored by the Court of Appeals in its decision when it stated:

> "Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. . . . Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special

> District has now been joined as a party defendant in this lawsuit. We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year." Appendix A at 15.

The logical outcome of the Court of Appeals' conclusion is that a federal court has the authority to remedy any constitutional violation which only inferentially arises from a lawsuit, even when the parties have had no notice of any such alleged violation and an opportunity to defend against it. Due process, at the very least, requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

Quite apart from the jurisdictional and procedural aspects of 12(b), the Court's finding underlying it was simply incorrect, a fact not surprising since there was no notice that such an issue would be tried by the District Court. The State did not create the special school district. It was created in 1957 by vote of the citizens of St. Louis County for the purpose of providing special education for students in all twenty four school districts of St. Louis County. In 1965, by means of another election, its authority was expanded to include vocational education. Also in 1965 the State Department of Education designated the Special School District, at its request, as an area vocational school. This designation carried with it the ability to receive increased funding but the existence of the Special School District and its ability to operate vocational programs was not in any way contingent upon such a designation.

Throughout this period of time the City of St. Louis had been operating its own vocational program. In 1967 it also sought and received designation as an area school for purposes of increased funding. Again, the authority of the St. Louis City School District to operate its own

vocational programs was not dependent in any way upon this designation. Further, the State does not, contrary to the assertion of the District Court, have the authority to merge these systems. Simply removing the designation as an area school would not have affected the authority of either district to provide vocational education. Further, any attempt to consolidate the two districts would have been a violation of Art. III, § 40(20) of the Missouri Constitution which prohibits the General Assembly from passing any local or special laws "creating new townships or changing the boundaries of townships or school districts; . . ." Thus, neither the pleadings nor the evidence before the District Court justifies the sort of mandatory relief contemplated by paragraph 12(b).

In their earlier motion for stay of the mandate of the Court of Appeals, petitioners noted the possibility that the State of Missouri may be required to fund even a voluntary agreement under 12(b). This possibility has come to pass in view of the events outlined above. However, even assuming that the Special School District of St. Louis County is willing to volunteer for purposes of this program, mandatory participation by the State of Missouri would exceed the jurisdiction of the District Court both for the reason that the specific finding of the District Court relating to vocational educational is neither factually or jurisdictionally proper and for the reason that the general finding against the State of Missouri that it had failed to disestablish its dual school system in the City of St. Louis is an inadequate basis for mandatory funding of a voluntary plan. See argument in the preceding point regarding the 12(a) plan.

V.

The District Court exceeded its authority and violated Due Process in paragraph 12(c) of its May 21, 1980 Order

in which it required the submission of ". . . a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County" because, to date, this litigation has not been inter-district in scope and as a result no evidence has been introduced which would even remotely call for the submission of such a plan.

In paragraph 12(c) of its May 21, 1981 Order, the District Court ordered the State defendants, the United States and the St. Louis Board of Education "to develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." *Liddell* v. *Board of Education, City of St. Louis*, 491 F.Supp. 351, 353 (E.D.Mo. 1980).

At the present time the reporting and filing dates under this portion of the District Court's Order have been temporarily suspended. However, since this suspension could be lifted at any time, the issue of the validity of 12(c) remains viable.

The petitioners believe that the basic impropriety of paragraph 12(c) is that at the time of its entry and even at the present time, this litigation has not been inter-district in scope. As noted earlier in this petition, it was not until January of 1981 that the City School Board in the NAACP sought leave to amend their pleadings both to add forty additional school districts as party and to state claims for interdistrict violations. To date those motions to amend have not been ruled upon. Since the District Court is requiring the submission of a possible remedy before even hearing the evidence on the existence or nonexistence of a constitutional violation, it would appear

to be a classic case of putting the cart before the horse. It almost goes without saying that an interdistrict remedy must be premised upon an interdistrict violation and that the remedy must fit the scope of the violation. *Milliken* v. *Bradley*, 418 717 (1974). Further, submission of such a plan in advance of any finding of Constitutional violations would compromise the petitioners' right to be heard at a meaningful time and in a meaningful manner. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

In its February 13, 1981 Opinion the Court of Appeals stated as follows with regard to paragraph 12(c) of the District Court's Order.

> "[T]o the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be 'government-imposed.' But, to the extent that any such segregation was imposed by the State or other defendants, and to the extent that those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so." Appendix A at 16.

Thus, the Court of Appeals is again affirming the power of the District Court to remedy whatever it preceives as constitutional violations. Petitioners believe that they should have notice of such allegations and the opportunity to defend against them. It is very little consolation to the petitioners that paragraph 12(c) requires only the submission and not the implementation of a plan, as has been frequently argued by other parties to this litigation. The fact of the matter is that if the petitioners were to submit any sort of plan, they would in effect have to admit that there are vestiges of State-imposed segregation between the City of St. Louis and

St. Louis County. To *require* a party to make any admissions at all under the guise of a court order, is a clear abuse of judicial authority. In an earlier brief the NAACP urged the Court of Appeals below to put Missouri in its "constitutional place". While the petitioners would not be so blunt about the matter, it is their position that the Court's entry of paragraph 12(c) of its Order, as well as paragraphs 12(a) and 12(b), call out for the exercise of this Court's supervisory authority over the lower federal courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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June, 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other schoolage children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secre-

No. 80-1458

Appeals from the United States District Court for the Eastern District of Missouri.

tary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horce Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens committee"

United States of America,

Appellee,

v.

No. 80-1494

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L.

Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Appellant.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cerdric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela

Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

No. 80-1531

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guard-

ian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1599

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next

Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1735

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Submitted: November 13, 1980

Filed: February 13, 1981

Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

We are asked by the State of Missouri and by three groups of parents to set aside the plan of the United States District Court for the Eastern District of Missouri for in-

tegrating the public schools of St. Louis. The State argues that it has been required to pay too much toward the integration plan and that it should not be ordered to participate in developing either a voluntary or an involuntary inter-district integration program. The white parent group complains that the district court plan goes too far and is unfair to white students. The black parent groups assert that the plan doesn't go far enough in that it leaves some schools in North St. Louis all black. All of the appellants assert that the district court erred in failing to find that the United States contributed to the segregation of the St. Louis school district and to require it to pay a substantial portion of the cost of integrating the school system.

We affirm the decision of the district court. The desegregation plan was designed in accordance with the letter and spirit of the mandate of this Court and it meets constitutional requirements. If the plan is fully implemented in the same spirit and with the continuing cooperation of parents, students, teachers and community and religious leaders, a firm foundation will have been laid for affording the children of St. Louis a quality education in a racially neutral school system.

We take judicial notice of the fact that the Board of Education and one of the parent groups have filed amended complaints in the district court, asking the court to require inter-district integration with the schools of St. Louis, St. Charles and Jefferson Counties. We express no opinion as to the merits of the proposed amendments. We do, however, emphasize that the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration.

I.

This case, filed in district court in 1972, is before this Court for the third time.[1] When it was first here, we remanded it with directions to permit the Caldwell parent group to intervene as plaintiffs. *See Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977). When it was next here, we reversed the district court, concluding that the plaintiffs had clearly proven that the defendants had established and maintained a racially segregated school system in violation of the plaintiffs' constitutional rights. *See Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980). We remanded the case to the district court with the following admonition:

> Segregation in the elementary and secondary schools in St. Louis must now be eliminated. An integrated system must be devised and implemented promptly. In no other way can the constitutional right to an equal educational opportunity be assured to all children of St. Louis. With careful planning, expert advice, broad community participation and good faith, a plan to integrate the schools can be devised and implemented which will meet constitutional requirements.

Id. at 1291-1292.

Only one party—the Adams plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

On remand, the district court made every effort to comply with our charge. It established an interracial citizen's advisory committee to promote community involvement in the proceedings; it appointed Dr. Gary Allen Orfield

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[1]For a detailed account of the procedural history of this case, *see Adams* v. *United States*, 620 F.2d 1277, 1281-1284 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

to provide expert assistance in the preparation of a desegregation plan; it held extensive evidentiary hearings on proposed plans and the procedures involved in implementing them; and after a careful consideration of all the evidence, it approved a comprehensive desegregation plan to be effective at the start of the 1980-1981 school year. *See Liddell* v. *Board of Educ.*, 491 F.Supp. 351 (E.D. Mo. 1980).

II.

The plan approved by the district court is a modified form of the "Orfield approach" sanctioned by this Court in the previous appeal. *See Adams* v. *United States, supra,* 620 F.2d at 1293-1296. The essential elements of the plan include (1) reassigning students to achieve the greatest possible number of desegregated schools (defined at 30-50% black); (2) establishing magnet and alternative schools designed to attract students of all races from throughout the St. Louis area; (3) organizing a middle school system to facilitate clustering, pairing and other integrative efforts; (4) instituting and expanding specialty and part-time integrated programs; (5) facilitating permissive integrative transfers; (6) initiating cooperative inter-district desegregation programs; (7) providing for integration of and special training for school personnel; and (8) developing a comprehensive community relations program.

Although the plan reflects the fact that it is not possible to fully integrate every school in the St. Louis system, the district court faithfully followed the directions of this Court by providing a variety of integrative experiences and enhanced educational opportunities for students remaining in the predominately black schools.

The district court estimated that the overall cost of the desegregation plan would be approximately $22.1 million. The court directed the State of Missouri to pay one-half of the actual cost of desegregation. To finance the remaining

50%, the court ordered the Board of Education to transfer approximately $4.7 million out of its debt retirement account, noting that federal funds would cover the balance. Federal funding to assist in the integration process exceeded $7 million for the 1980-1981 school year.

III.

Four parties—the Liddell plaintiffs, the Caldwell plaintiffs, the Adams plaintiffs, and the State of Missouri defendants[2]—appeal from the district court's order approving the desegregation plan. For convenience, the issues on appeal may be divided into two categories: those relating to the design of the plan and those relating to the financing of the plan. We first consider the challenges to the design of the plan.

A. *Design*

1. The Liddell and Caldwell plaintiffs contend that the plan approved by the district court is constitutionally deficient because it does not go far enough to remedy the effects of the defendants' discriminatory practices. Specifically, they argue that the district court erred in holding that schools with 30-50% black enrollments were to be considered integrated. Their position appears to be that the only constitutionally permissible means of integrating the St. Louis system was to reassign students so that each school had the same racial mix as the district as a whole—approximately 76% black and 24% white.

We cannot agree that the options available to the district court were so limited. In our decision of March 3, 1980,

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[2]The "State defendants" include the State of Missouri and its Board of Education, as well as the following Missouri officials: the Governor, the Attorney General, the Treasurer, the Commissioner of Education, the Commissioner of Administration, and the individual members of the Missouri Board of Education. Because their interests are identical and they have filed a joint brief, we refer to these parties collectively as the State of Missouri.

we specifically stated that a plan similar to the one adopted by the district court would meet constitutional requirements. In so doing, we accepted the testimony of Dr. Orfield that such a plan would have the best chance of successfully integrating the St. Louis schools and stabilizing neighborhoods already integrated.

In affirming this aspect of the plan, we emphasize that students remaining in the predominately black schools in St. Louis are not left completely untouched by the new system. Provisions affecting the remaining black schools include magnet and alternative programs, new and expanded specialty programs, permissive intra-district transfers, staff desegregation, staff development, a City/County integrated vocational program, and voluntary pupil exchanges with suburban school districts. We also emphasize that the plan requires the Board of Education to spend a substantial portion of the $22 million desegregation budget to improve the quality of education in those schools that remain all black and continuing expenditures are required for this purpose. Moreover, although a number of all-black or virtually all-black schools remain in St. Louis under the plan, the new system does eliminate the all-white schools from the district. Thus, although the degree of actual integration achieved under the plan is not optimal, we reiterate our view that under all the circumstances, the plan is a constitutional one and has a better chance of providing a quality integrated education for the school children of St. Louis than any of the other plans that were presented by the parties to this lawsuit.[3]

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[3]We note that the plan approved by the district court appears to permit up to a 15% deviation from the 30-50% black guideline used to define integrated schools. In our view, a deviation of this magnitude should be permitted only rarely and then only after the court has determined, following a hearing in which the parties are given an opportunity to present their views, that allowing the variance will not impair the overall effectiveness of the desegregation plan.

2. In contrast with the position of the Liddell and Caldwell plaintiffs, the Adams plaintiffs argue that the district court has gone too far in the intra-district pupil reassignment portion of its plan.[4] They note that the Court has included in the reassignment plan a number of schools that were between 30 and 50% black prior to desegregation. These schools, they contend, should not have been required to participate in the plan in view of this Court's determination that the boundary lines and assignment patterns for schools with 30-50% black enrollments should remain substantially changed.

This contention is without merit. Although reassignment does affect some schools that had a pre-plan enrollment of 30-50% black, we are satisfied that their inclusion does not violate our order of March 3, 1980. First, it turned out to be necessary to include some of these schools to accommodate the change from a two-tier (kindergarten-8; 9-12) to a three-tier (kindergarten-5; 6-8; 9-12) system, a change that was designed to help facilitate clustering and other integrative efforts and to improve the overall educational opportunities in St. Louis. Second, it appears from the record that many of the schools cited by the appellant as having a pre-plan black population of between 30 and 50% had such a racial mix because students were transported to them, not because the neighborhoods surrounding the schools were integrated. Still other schools were included because their black enrollment percentage has increased rapidly in recent years, indicating that their black population would be likely to exceed 50% in the near future. When read in context, it is clear that our decision of March 3

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[4]The Adams group also claims that the Board of Education relied onfalse enrollment and other data in developing the plan. Although there may be minor discrepancies in some of the figures, we find no support in the record for the appellants' position that the information relied upon was so inaccurate that the plan must be invalidated.

was intended to minimize the transportation of students and to encourage the development and maintenance of integrated schools in integrated neighborhoods. In our view, the plan approved by the district court is faithful to this concept.

3. The State of Missouri is the sole challenger to paragraph 12 of the district court's order, which provides for various forms of inter-district relief. The State argues that the district court is without authority to order the preparation of any inter-district plan unless and until the suburban districts are joined as parties to the lawsuit. The Adams group, by contrast, argues that the court erred in not developing a more comprehensive inter-district remedy.

Paragraph 12 of the district court's order provides in part:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.
>
> b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school

district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of goverment-imposed school segregation in the City of St. Louis and St. Louis County.

491 F.Supp. at 353.

The appellees contend that this Court should not hear the State's challenge at this time because the directives contained in paragraph 12 are neither final judgments appealabe under 28 U.S.C. § 1291 nor orders granting or denying injunctive relief appealable under 28 U.S.C. § 1292. Although the line between appealable and nonappealable orders is rarely clear in a case in which the district court retains jurisdiction over a developing desegregation plan, we are persuaded that we have jurisdiction over these issues in this appeal.[5] Accordingly, we consider the challenge to paragraph 12 on the merits, examining each section of the paragraph separately.

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[5]In support of their position that the provisions of paragraph 12 are nonappealable, the appellees cite to cases in which appeals courts ruled that orders directing school boards to formulate desegregation plans were nonappealable. *See Bradley* v. *Milliken*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972); *Taylor* v. *Board of Educ.*, 288 F.2d 600 (2d Cir 1961) The State of Missouri distinguishes the cases cited by the appellees by noting that the school board in each of those cases was ordered to prepare a remedy consistent with its judicially determined constitutional liability Here, the State argues, the district court exceeded its jurisdiction by ordering the parties to prepare a plan involving other school districts, even though it is conceded that the suburban districts cannot be considered to be constitutional violators unless and until they are joined as parties to the litigation. While the question is not free from doubt, we are satisfied that we have jurisdiction to hear an appeal from a remedial order that, on its face, arguably involves potential parties who have not yet had their day in court.

Section (a) of paragraph 12 directs the parties to "make every feasible effort" to work out a voluntary plan of inter-district pupil exchanges to be implemented in the 1980-1981 school year. Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up. Under the terms of the order, the plan is to be designed to "assist in alleviating the school segregation in the City of St. Louis [and to ensure] that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353. Thus, the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City.

Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." 491 F.Supp. at 358. Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit. We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year.

Section (c) of paragraph 12 is also within the authority of the district court. By its terms, that section required the parties to develop and submit to the court by November 15, 1980, a "suggested" inter-district plan "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." We must read the term "government-imposed" to mean

"found to be government-imposed by a court." Therefore, to the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be "government-imposed." But, to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so.

Furthermore, we recognize that the Board of Education and the Caldwell plaintiffs have petitioned the district court to amend their complaints to add as parties defendant the school districts in the three-county area surrounding the City of St. Louis. We express no opinion on the merits of those motions, but we emphasize that the current parties have a responsibility to comply with the terms of the district court order, including the provisions of paragraph 12, regardless of the disposition of the motions pending before the district court.[6]

4. The Adams and the Liddell plaintiffs maintain that the district court erred in approving the personnel assignment portion of the desegregation plan. Both appellants oppose the court's adoption of a "Singleton" plan of personnel assignment, which provides that the black to white staff ratio in each school is to be substantially equal to the district-wide black to white staff ratio. They argue that the Singleton formula is inconsistent with the following directive of this Court: "The consent decree, insofar as it

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[6]We note that the district court has found it necessary to extend the deadlines for filing the proposed plans under pargaraph 12(a)-(c) and that it is apparently having some difficulty in getting complete and adequate proposals from the parties. We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop and implement the plans contemplated by paragraph 12. It is imperative that the district court countenance no excuse for further delay.

pertains to faculty integration, shall be fully implemented and additional steps taken to ensure that school personnel at every level will be integrated." *Adams* v. *United States, supra,* 620 F.2d at 1297. In our view, the plan approved by the district court goes beyond what we required, at least with respect to classroom teachers. We will not quarrel with that decision.

The Liddell and Adams groups argue that the personnel integration provision of the plan is inadequate because it fails to integrate the administrative staff. The district court's order provided that a Singleton assignment formula should apply to "[a]ll principals, teachers, and other certified staff who work directly with children at a school." 491 F.2d at 354. The court also stated, "The same criteria shall apply to non-certificated personnel." *Id.* We read these statements to provide that the Singleton assignment scheme is to apply to *all* principals, *all* teachers and *all* non-certificated personnel, as well as to certificated staff members who work directly with children. It appears that nothing is said about administrators other than principals. That is not surprising, inasmuch as the Singleton approach matches district-wide race ratios with staff ratios at each school. There is no way, therefore, to apply that formula directly to administrators who are not assigned to specific schools. We assume that as to such personnel, the prior directive of this Court will be followed, and are confident that if that phase of the plan has not yet been implemented, it will be by the opening of the 1981-1982 school year.

5. The Adams and Liddell plaintiffs also join in challenging the manner in which the burdens of desegregation are distributed among the students. The Adams group contends that the burdens are borne disproportionately by the white students, while the Liddell group asserts that the black students suffer the greatest adverse effects under the plan.

We find no support in the record for either of these positions. The Adams appellants base their argument on the fact that slightly over one-half of the students transported to schools out of their neighborhoods are white even though white students comprise only 24% of the school population. In our view, that is not sufficient to show that the white students bears a disproportionate burden. In a situation such as that in St. Louis, where it is necessary to exchange black students with white students in order to integrate the schools, the number of whites who are transported will almost necessarily be approximately equal to the number of blacks who are similarly transported. Under these circumstances, the percentage of each race transported is not controlling.

The Adams group also argues that the black students reap a disproportionate amount of the benefits from the plan. That assertion simply has no support in the record.

The basis of the Liddell group's challenge is essentially that some black children remain in predominately black schools under the plan.[7] We have answered that complaint earlier in this opinion.

6. The Caldwell group raises two issues concerning the composition and operation of the citizens' committees appointed by the district court. In our March 3 opinion, we stated,

> The Board of Education is to be given the principal responsibility for developing and implementing a comprehensive plan to integrate the school system. In ful-

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[7]The Liddell plaintiffs also assert that the district court violated this Court's mandate by failing to establish an educational park in the City of St. Louis. In our March 3 opinion, we did refer to an educational park as one possible method of providing enhanced educational opportunities for St. Louis students. We did not, however, require the district court to establish such a park.

> filling this responsibility, the Board shall work with the parties of this lawsuit, a broadly based interracial committee to be named by the district court and an expert, or experts, to be named by the district court.

Adams v. *United States, supra,* 620 F.2d at 1295 (footnote omitted).

In accordance with this directive, the district court appointed a twenty-member bi-racial "Citizens' Committee" to assist the Board of Education in developing the desegregation plan. The members of the Citizens' Committee were chosen from lists provided by the parties; four of the twenty members were selected from the list submitted by the Caldwell plaintiffs. Following approval of the plan, the court disbanded the Citizens' Committee and adopted a new "Desegregation Monitoring and Advisory Committee." The new group was composed of twelve members, one-half of whom were members of the original Citizens' Committee.

The Caldwell plaintiffs assert that they are not adequately represented on this new committee. The record shows, however, that two of the twelve Monitoring Committee members, including the vice chairperson, were originally nominated for the Citizens' Committee by the Caldwell group. It also shows that six of the twelve members on the Monitoring Committee are black. In light of these facts, no abuse of discretion has been demonstrated.

The Caldwell appellants' second objection to the Monitoring Committee is that the district court erred in expressly authorizing *ex parte,* oral communication between the court and the Monitoring Committee chairperson and vice chairperson. We agree that all parties are entitled to know of the advice given the court by the Committee. *See Bradley* v. *Milliken,* 620 F.2d 1143, 1156-1158 (6th Cir.), *cert. denied,* 101 S.Ct. 207, 66 L.Ed.2d 80 (1980). The best practice would be to reduce to writing all communications between the

court and the Committee, make them part of the record, and provide them to counsel for the parties. If oral contact is deemed necessary by the district court, the parties should, where possible, be given notice and opportunity to be present when the oral report is received. To this point, however, no prejudice has been shown from any alleged *ex parte* contacts.

B. *Financing*

1. All four of the appellants join in mounting the primary challenge to the financing of the desegregation plan, arguing that the district court erred in failing to directly order relief against the United States government.[8]

In support of their position, the appellants point to evidence in the record, as well as to statements of the district court and this Court, indicating that the policies and practices of the federal government have been a significant cause of segregation in the St. Louis school system. The

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[8]The claims of the Caldwell appellants go beyond the financial liability of the United States. They maintain that the government should be required to take affirmative steps to reverse the discriminatory effects of federal housing and other policies. This issue has not been tried in this lawsuit. Accordingly, the district court did not err in refusing to grant affirmative relief against the United States.

We note in passing that the district court has taken steps to ensure that federally assisted housing programs are operated so as to aid in the implementation of school desegregation in St. Louis. In paragraph 12(d) of its order, the district court directed the State defendants, the United States and the St. Louis Board of Education

> [t]o develop and submit to the Court by November 1, 1980, in conjunction with the Community Development Agency of the City of St. Louis, a suggested plan for insuring that the operation of federally-assisted housing programs in the St. Louis metropolitan area will facilitate the school desegregation ordered herein.

491 F.Supp. at 354.

No party has challenged this aspect of the district court's order. The parties have submitted plans in accordance with the order, and we approve of this effort to facilitate implementation of the overall desegregation plan.

fact remains, however, that no party has named the United States as a defendant and alleged that it engaged in discriminatory practices.[9] The real question, therefore, is whether the district court abused its discretion in refusing to grant the Caldwell plaintiffs' motion to amend its complaint to seek relief against the United States.

Under all the circumstances of this case, we find no abuse of discretion. The Caldwell plaintiffs' motion to amend was filed on May 23, 1980, one week after the district court concluded evidentiary hearings on the proposed desegregation plans. At that time, the district court was operating under a stringent time schedule, mandated by this Court, requiring that the plan be implemented by the beginning of the 1980-1981 school year. Given this need to expedite approval and implementation of the plan and the likely delay attendant in adding new theories of liability against a new defendant, we hold that the district court did not abuse its discretion in refusing to grant the Caldwell group's motion to amend at that time.

In affirming the district court's refusal to grant relief against the United States, we are mindful of the significant financial role played by the federal government in implementing the St. Louis desegregation plan. In its order approving the plan, the district court expressly recognized that a substantial portion of the funding for integration would come from the United States government. The court directed the United States Department of Education to expedite the processing of funding applications for St. Louis under the Emergency School Aid Act (ESAA), 20 U.S.C.

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[9]The Adams plaintiffs did name the United States as a defendant in its complaint in intervention. Rather than complain of the government's segregative acts, however, the Adams group alleged that the United States illegally required the St. Louis school district to take steps to desegregate the schools as a condition to release of federal funds for the district.

§ 3191 *et seq.* Apparently, this direction was heeded since the St. Louis school system received over $7 million in ESAA funds—nearly one-third of the desegregation budget—to cover the costs of implementing the plan during the 1980-1981 school year. Moreover, the evidence in the record gives us no reason to believe that similar funding will not be available to continue implementation of the plan for the foreseeable future. Under these circumstances, we are unwilling to hold that the district court erred by failing to expressly order the United States to pay for part of the desegregation plan.

2. The State of Missouri vigorously contends that it should have no part in paying for the costs of integration because its actions did not violate the Constitution. More precisely, the State argues that this Court did not overrule the district court's earlier finding of non-liability on the part of the State. Thus, the State asserts, the district court was precluded on remand from finding the State to be a constitutional violator.

This contention is wholly without merit. In our March 3 opinion, we specifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams* v. *United States, supra,* 620 F.2d at 1295 n.28. These statements amount to a clear reversal of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so.

3. As an alternative argument, the State contends that, even if it was proper to require it to fund part of the plan, it has been ordered to pay too great a share. The State

maintains that the amount it has been ordered to pay is not commensurate with the degree of its constitutional violation. In addition, it argues that the desegregation plan budget is inflated and that the State's portion of the funding is too great as a result. We agree with neither contention.

After reviewing the discreminatory action and inaction of the State of Missouri, the district court concluded that "the State defendants stand before this Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty." 491 F.Supp. at 359. This conclusion has ample support in the record; as noted, we recognized as much in the prior appeal. It was well within the discretion of the district court, therefore, to order the State to pay one-half of the costs of integrating the St. Louis school system.

The State's complaints about the desegregation plan budget are that it includes items that are not properly considered part of the integration process and that certain savings were not taken into account. We need not review the specific items in the plan budget, however, because it is clear that the approved budget is only an estimate of the expected costs of implementing the plan. The district court's order requires the State to pay one-half of the *actual* costs of implementing the desegregation plan; the budget is used only to set a ceiling on the amount of the State's participation. In addition, the district court specifically directed that "continued efforts be made to reduce the actual costs of implementation." 491 F.Supp. at 352[10]

[10]Like the State of Missouri, the Aadms appellants contest the validity of the budget on the ground that it includes items not necessary for integration. Inexplicably, the Adams group also takes the seemingly inconsistent position that the amount allocated by the budget is insufficient to desegregate the St. Louis schools. For the reasons stated in the text, we need not decide the validity of these challenges to the budget.

4. The Adams' plaintiffs contend that the district court erred in directing the Board of Education to transfer approximately $4.6 million in excess funds from its debt retirement account to be used to make the building modifications necessitated by the desegregation plan. This complaint is based on the assertion that the Board of Education was without authority under Missouri law to collect surplus funds in the account reserved for the retirement of bonds. The Board of Education responds that the money in the debt retirement account was collected in accordance with statutory guidelines following annual public hearings, and that no one has complained of the accumulated surplus prior to this time.

We decline to rule on whether Missouri law authorized the Board of Education to accumulate funds in its debt retirement account. This is surely not the most suitable forum for determining the propriety of the Board of Education's bond issues. We are satisfied that the district court had discretion to order the transfer of funds already collected and held by the Board.

To summarize, we affirm the judgment of the district court and commend it for the manner and promptness with which it implemented the earlier decision of this Court. We remand the matter to the district court with directions to continue with the implementation of its plan in accordance with the slight modifications made by this opinion. All parties will bear their own costs in this appeal.

A true copy.

Attest:

CLERK,

U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other schoolage children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secre-

No. 80-1458
Appeals from the United States District Court for the Eastern District of Missouri.

tary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horce Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens committee"

United States of America,

Appellee,

v.

No. 80-1494

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L.

Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Appellant.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cerdric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela

Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

No. 80-1531

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees,

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guard-

ian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1599

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next

Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1735

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Bussee, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Filed: March 19, 1981

Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

ORDER

This Court has before it a number of motions relating to the above entitled case.

I.

The motion of the Special School District of St. Louis County, Missouri, to intervene on appeal for the purpose of filing a petition for rehearing or rehearing en banc is granted. The petition for rehearing or rehearing en banc is denied, the latter by a unanimous vote of the Court.

The Special School District asks us to review our decision of February 13, 1981, asserting that that decision is inconsistent with an August 15, 1980, order of this Court which denied the Special District's petition for a writ of prohibition.

We do not agree. The primary issue addressed by this Court in its August 15 ruling was whether the Special District would be provided with a full and fair opportunity to present its views to the district court prior to being ordered to remedy its constitutional violations, if any.

The district court correctly perceived the thrust of our August 15 ruling. In a December 19, 1980, order denying the Special District's motion to disqualify him from further proceedings in the case, Judge Meredith declared, "The Special District can rest assured that before any action is taken that would affect it, it will have ample opportunity to be heard." Similarly, in an order dated March 4, 1981, Judge Hungate reiterated the view that voluntary cooperative efforts with the School District of the City of St. Louis would result in no prejudice to the legal rights of the Special District:

> This Court emphasizes that a 12(b) *plan* has merely been filed with the Court as required by Judge Meredith's order of May 21, 1980. No action has or will be taken until a hearing has been held during which the [Special District] will have ample opportunity to be heard. [Emphasis included.]

Judge Hungate has now set May 11, 1981, as the hearing date for questions involving the Special District, and he has established a discovery and briefing schedule designed to facilitate resolution of the issues and provide the parties with full opportunity to be heard. We express no opinion as to the merits of the issues to be heard by Judge Hungate.

II.

The Caldwell plaintiffs petition this Court for rehearing, modiciation and/or clarification of this Court's decision of February 13, 1981. They ask this Court to modify its February 13, 1981, opinion "to reflect the fact that paragraph 12(c) of Judge Meredith's order of 21 May 1980 was amended by him on 17 September 1980, and that proceedings now pending in the district court may moot the controversy over paragraph 12(c)."

In subdivision III of this order, we have denied the State of Missouri's motion for a stay of mandate or stay of enforcement of the district court's paragraph 12 orders. In that subdivision, we acknowledge the amendments made by the district court; we see no need to further modify our opinion of February 13, 1981. There is nothing inconsistent about paragraphs 12(a) and 12(c), and both are valid parts of the district court's order. We additionally acknowledge the protective orders entered by Judge Meredith on June 17, 1980, and October 6, 1980, were extended by Judge Hungate on March 4, 1981, and note our concurrence therewith.[1]

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[1]In essence, these protective orders provide that any form of voluntary cooperation by the parties or County school districts will not be used as evidence in pending district court proceedings or otherwise prejudice the legal rights of any party or County school district to resist judicial imposition of compulsory inter-district remedy.

The Caldwell plaintiffs also ask this Court to clarify its decision on the allocation of costs on appeal or, in the alternative, to grant a rehearing and direct that "the costs on appeal, including attorneys' fees, be awarded against the State and St. Louis Board defendants in their favor. We decline to attempt to restate our original intentions concerning costs. Prior to the filing of this petition, the Caldwell plaintiffs made no application for attorneys' fees. We construe this petition, however, as a request for a ruling on whether they are entitled to attorneys' fees. We hold that they are not.

III.

On February 19, 1981, the State of Missouri[2] filed a motion requesting this Court to "stay the issuance of its mandate * * * as well as the enforcement of paragraphs 12(a), (b), and (c) of the May 21, 1980 Order of the District Court * * *, including the [district court's December 19, 1980,] supplementary order pertaining thereto . . . ," pending the filing of a petition for a writ of certiorari in the United States Supreme Court. *See* Fed.R.App.P. 41(b). We deny the motion to stay our mandate or to stay enforcement of the district court's orders and adhere to our most recent pronouncement concerning the State's legal responsibilities for the prompt desegregation of the St. Louis public school system. *See Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 17-20, 27-29 (8th Cir. Feb. 13, 1981).

On March 3, 1980, this Court reversed the district court's determination that the various defendants in this litigation committed no constitutional violations in the

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[2]For a complete listing of the state defendant-appellants in this litigation, *see Liddell* v. *Board of Educ.*, *Nos.* 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 13 n.2 (8th Cir. Feb. 13, 1981).

formation and perpetuation of the admittedly segregated St. Louis public school system. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.)(en banc), *cert. denied*, 101 S.Ct. 88 (1980). At that time, we specifically noted that the State of Missouri, the Missouri Commissioner of Education and the Missouri Board of Education were added as defendants pursuant to various district court orders in the summer of 1977. *Id.* at 1283. Moreover, we recognized that actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area. *Id.* at 1291, 1294 n.27. The state defendant-appellants did not seek Supreme Court review of our Adams' decision.[3]

We remanded the case for further district court proceedings. Upon remand, the district court held that the State defendants are "primarily constitutional wrongdoers who have abdicated their affirmative remedial duty" concerning the segregated St. Louis public school system. *Liddell* v. *Board of Educ.*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). On February 13, 1981, we affirmed that determination and endorsed the desegregation plan adopted by the district court, including the provisions of paragraph 12. *Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 28-29 (8th Cir. Feb. 13, 1981).[4]

The district court amended paragraph 12 on September 17, 1980, and December 19, 1980. Unfortunately, these amendments were not included in the record submitted to this Court prior to our February 13, 1981, decision. Therefore, our February 13, 1981, decision does not discuss the district court's two amended orders. We are convinced,

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[3]Only one party—the Adams' plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

[4]We also affirmed the district court's determination that the State of Missouri must pay one-half of the actual costs of implementing a constitutionally required desegregation plan for the St. Louis public school system.

however, that these amendments do not alter the substance of original paragraph 12. Accordingly, we find it unnecessary to amend our February 13, 1981, decision to reflect the district court's September 17, 1980, and December 19, 1980, amendments. As amended, paragraphs 12(a)-(c) provide:[5]

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by *December 15, 1980.*
>
> *The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare co*ncrete

---

[5]We note that the State of Missouri has filed a notice of appeal from the December 19, 1980, order of the district court. While we express no opinion on the merits of that appeal, we emphasize that its pendency does not relieve the parties of their responsibility to fully follow the orders of the district court.

In the quotation in the text, the amendments to paragraph 12 made by the September 17, 1980, order of the district court are indicated in italics. The amendments made by the December 19, 1980, order are underlined.

and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or be-

fore February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by *December 15, 1980*, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involv-

ing the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that the provisions of paragraph 12, both as originally written and as amended, must be enforced. The State's motion does not raise any new issues. Indeed, we previously considered and rejected the very concerns presented in its stay motion. *See Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 19-20 (8th Cir. Feb. 13, 1981). In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations. *Id.* at 20. Paragraphs 12(a)-(c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.

The State of Missouri's motion is denied. We order prompt implementation of our mandate in *Liddell* v. *Board*

of Educ., Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir. Feb. 13, 1981).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al., *Defendants.*	No. 72-100-C (C)

ORDER

The Court held two meetings with all counsel, on September 12, 1980 and on September 17, 1980, to discuss the questions raised about the interpretation of paragraph 12 of the Order of May 21, 1980, and certain problems which have arisen in connection therewith. It appears to the Court that it is highly important that the efforts of the United States, the State, and the St. Louis Board of Education, heretofore developed with the cooperation of county school districts should be continued and intensified. This and other considerations indicate the advisability of changing timetables and certain aspects of the parties' participation in some of the programs which are the subject of subparagraphs (a) through (d) of paragraph 12.

IT IS THEREFORE ORDERED that:

1. (a) Paragraph 12(a) is hereby amended by changing the date of July 1, 1980 to December 15, 1980, and adding thereafter the following: The State defendants, the

United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

(b) One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

2. The filing date of November 1, 1980 provided for in paragraph 12(b) of the said Order for a plan to consolidate or merge and full desegregation of the vocational programs is hereby extended to December 15, 1980.

3. Paragraph 12(c) is hereby amended as to the following provisions: On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of interdistrict school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportaton times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

4. The filing date of November 1, 1980 provided for in paragraph 12(d) of the said Order for a suggested plan to insure that the operation of federally assisted housing programs in the St. Louis metropolitan area will facilitate the St. Louis school desegregation is hereby extended to November 17, 1980.

5. Dr. Gary Orfield and Edward T. Foote shall continue their work of coordination and assistance to the parties, particularly those having direct responsibility under any of the foregoing paragraphs. It is expected that Dr. Orfield will be available to assist the State defendants who will take the leading role in developing the feasibility plan under paragraph 12(c) as amended herein. Dr. Orfield is authorized, upon notice to the Court and the parties, to engage such additional experts and develop such additional information as he deems necessary in the performance of his court-designated duties. Dr. Orfield shall

submit to the Court on November 17, 1980 an interim status report on the progress that is being made by the parties in the development of their respective reports to the Court. Dr. Orfield shall submit a final, substantive report three weeks after the date on which the three parties referred to submit the plans and reports required of them.

DATED this 17th day of September, 1980.

James H. Meredith
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al., *Defendants.*	**No. 72-100-C (C)**

ORDER

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that:

1. Pursuant to paragraph 12(a) of the Court's Order of May 21, 1980 (as amended September 17, 1980), the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

2. The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis

County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

DATED this 19th day of December, 1980.

J. H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, Missouri, et al.,
Defendants.

No. 72-100-C (C)

MEMORANDUM

On December 15, 1980, the State of Missouri submitted a plan pursuant to paragraph 12(a) of the Court's Order of May 21, 1980. The Court has examined the plan as well as the joint report filed by the United States and the Board of Education of the City of St. Louis.

This Court is well aware of the problems encountered by the Board of Education of the State of Missouri attempting to obtain the voluntary cooperation of the County school districts in a plan which would assist in the desegregation of the City schools. The Court is also aware that the State of Missouri has appealed the orders of this Court; arguments on these matters have been heard by the United States Court of Appeals for the Eighth Circuit. However, the fact remains that the Court of Appeals for the Eighth Circuit has found that the State of Missouri as a matter of law has a duty to eliminate segregation in the schools of this State. That Court also suggested to this Court that an effort be made to work out a voluntary plan of integra-

tion within the County school districts. *See Adams* v. *United States*, 620 F.2d 1277, 1296 (8th Cir. 1980).

It is the opinion of this Court that the plan submitted by the State of Missouri is insufficient for this Court to make a determination as to whether or not it is feasible to pursue further the voluntary avenues of integration with the County schools. Various parties of this suit have indicated that it is their intention to add as parties to this suit a number of the districts in St. Louis County as well as the school districts in Jefferson and St. Charles Counties if a voluntary plan cannot be formulated. In one last effort to promote a voluntary plan, this Court will order the State of Missouri, and particularly the Board of Education for the State of Missouri and the Commissioner of Education for the State of Missouri, to submit another voluntary and cooperative plan on or before February 2, 1981.This plan shall contain the following:

1. The number of students that each district in the County can accommodate caused by the decrease in the number of students between the school years 1979-80 and the beginning of school year 1980-81.

2. Specific details for each district on the number of teachers, available space, and the desirability of its location for students from either the City of St. Louis or other districts within the County.

3. The present racial mixture of each school district in St. Louis County.

4. A plan providing for the interchange of students between the districts of the County in order to achieve more integration, and between the County and the City.

5. Specific recommendations for locations of magnet schools and the manner in which they may be implemented both on a part-time and a full-time basis for students within the County and from the City.

6. Specific financial estimates of costs and the means whereby the plan may be financed. The burden of financing will be borne primarily by the State of Missouri and shall discuss the possibilities of:

a. New legislation;

b. A fiscal incentive bill so that the districts participating will enhance their situation by participating;

c. Money to be taken from surplus of the State and given to the State Board of Education to pay the cost of transportation and additional expenses involved; and

d. Remuneration from the federal government on such plans.

7. Specifics as to the types and locations of magnet schools within the County. The plan should be specific on how the locations have been chosen. Locations shall be chosen in a fashion that would allow students from Jefferson County and St. Charles County to participate in the magnet schools if they desire.

The State of Missouri has a strong, effective Department of Education. It has a great deal of expertise and experience and should experience little difficulty in drawing and implementing a plan of voluntary and cooperative integration which is educationally sound and comprehensive. The Court will be looking forward to its comprehensive report to be filed on February 2, 1981. This report shall assume that each district in the County will participate in the voluntary and cooperative plan. The plan shall encompass every district in St. Louis County.

When the plan is filed on February 2, 1981, it shall also be sent to all parties of this litigation and to every district in St. Louis County as well as St. Charles and Jefferson Counties.

The Department of Education of the State of Missouri shall then contact each district in the County and report back to the Court on March 2, 1981. Included in its report shall be a list of those districts in St. Louis, Jefferson and St. Charles Counties that are willing to participate and the manner in which they are willing to participate. Included also shall be a breakdown for each district of the number of students the district is willing to receive and the number of students the district is willing to send to other districts, including the race and grade of those students participating. The Department of Education shall also report on those districts which refuse to participate in the plan.

DATED this 19 day of December, 1980.

J. H. Meredith
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	**No. 72-100C(4)**

ORDER

This matter is before the Court on the Board of Education's motion filed on January 27, 1981, to stay discovery proceedings.

Parties to this nine-year-old suit have continually delayed meeting obligations to remedy the effects of unconstitutional segregation. This Court has been directed by the Eighth Circuit Court of Appeals to "countenance no excuse for further delay." *Liddell* v. *Board of Education of the City of St. Louis*, No. 80-1458, slip op. at 20 n.6 (8th Cir., Feb. 13, 1981). To this end, the Court denied, on February 26, 1981, State defendants' motion to stay Judge Meredith's order of December 19, 1980. The orders of this Court must be complied with or action will be taken against the parties as herein detailed.

For the reasons stated below, the Board's motion to stay discovery is granted for a period of sixty days fol-

lowing the date of this order, except insofar as discovery relates to the Special School District. In addition, the State defendants, in conjunction with the City Board of Education and the United States, shall comply with Judge Meredith's order dated December 19, 1980, within sixty days of the date of this order, with an interim progress report to be filed within thirty days.

I. *Background.*

Prior to the Supreme Court holding in *Brown v. Board of Education,* 347 U.S. 483 (1954), the State of Missouri required segregation in schools by law. The State Constitution provided that:

> Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law. Mo. Const. art. IX, § 1(a)(1945).

Several state statutes similarly required segregation in public schools. *See, e.g.,* Act of February 6, 1847, § 1, 1847 Mo. Laws 103; Act of February 17, 1865, § 13, 1865 Mo. Laws 170; Act of June 11, 1889, § 7051a, 1889 Mo. Laws 226. For example, one statute in effect at the time *Brown* was decided provided that

> Separate free schools shall be established for the education of children of Arican descent; and it shall herein be unlawful for any colored child to attend any white school, or for any white child to attend a colored school. Mo. Rev. Stat. § 163.130 (1939).

Until 1954, any school board in the State of Missouri attempting desegregation would have found itself in violation of the Constitution and statutes of the State of Missouri.

In these circumstances, the State of Missouri stands before this Court in a different light than do other parties in this case.

Eighth Circuit Court of Appeals Mandate: March 3, 1980

On March 3, 1980, the Eighth Circuit Court of Appeals found that the Board of Education of the City of St. Louis had failed to integrate the "state-mandated segregated [school] system" as required by the Supreme Court's mandates of *Brown* v. *Board of Education, supra;* 349 U.S. 294 (1955). *Adams* v. *United States, supra* at 1280. The Court of Appeals directed the district court to require "the Board of Education, in conjunction with the parties . . . to develop and implement a plan that will integrate the St. Louis public schools." *Id.*

District Court Orders

On May 21, 1980,, Judge Meredith ordered State defendants, the United States and the City Board of Education [hereinafter "Polities"]:

> 12(a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the court for approval by July 1, 1980.

The Court hereby reaffirms Judge Meredith's Order in directing the City Board and the United States to cooperate in the preparation of such a plan.

Delay of Compliance with Court Orders

The questions here presented are not new to this Court. State defendants have repeatedly made application to this and other courts in an effort to delay compliance with Judge Meredith's orders.

It is clearly established that unconstitutional segregation of public schools must be remedied "with all deliberate speed." *Brown v. Board of Education, supra,* 349 U.S. at 201. *See, e.g., Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now.*"); *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 234 (1963) ("The time for mere 'deliberate speed' has run out . . . .").

Notwithstanding a clear constitutional obligation, the following chronological review illustrates defendants' continual delay and failure to comply.

A. *June 17, 1980:* State defendants appealed Judge Meredith's Order to the Eighth Circuit Court of Appeals. On August 15, 1980, the Appeals Court denied the request for a stay.

B. *June 20, 1980:* Judge Meredith extended the deadline for filing a 12(a) plan until July 14, 1980.

July 14, 1980: Defendants submitted an Interim Joint Report and Judge Meredith granted defendants an extension until August 22, 1980, in which to file a final report.

August 22, 1980: Defendants submitted a Second Interim Joint Report.

C. *September 2, 1980:* Mr. Justice Blackmun denied the State defendants' request for a stay of Judge Meredith's May 21, 1980, ruling.

September 9, 1980: Mr. Justice Rehnquist denied the same request.

D. *September 17, 1980:* Judge Meredith amended paragraph 12(a) of the order dated May 21, 1980, by changing the date of July 1, 1980 to December 15, 1980 . . ."

Insufficiency of Compliance

On December 15, 1980, State defendants filed a plan pursuant to the Court's May 21, 1980, order, as amended. On the same date, the City Board of Education and the United States filed a Joint Report Under Paragraph 12(a) of the Court's Order of May 21, as amended, stating:

> [N]otwithstanding the efforts of all parties, it has proven impossible to arrive at the degree of consensus which is necessary for a Joint Report. Therefore, the United States and the City Board felt constrained to prepare and submit the present Report independently from the the State defendants . . . . Several draft plans have been circulated by the State . . . but none of them addresses the requirements of the Order to a degree sufficient to reach or even approximate compliance.

Following a thorough review of the State's plan, Judge Meredith issued an order and memorandum, on December 19, 1980, stating:

> It is the opinion of this Court that the plan submitted by the State of Missouri is insufficient for this Court to make a determination as to whether or not it is feasible to pursue further the voluntary avenues of integration with the County schools.

The Judge ordered the State of Missouri to "submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981." Further, the Judge ordered:

> The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan.

Continuing Delay

On January 28, 1981, State defendants filed a motion for a stay of Judge Meredith's order of December 19, 1980.

The parties to this action have filed three motions in opposition to State defendants' motion for stay; one motion has been filed in favor:

1. In Opposition—February 2, 1981, Response of the United States in Opposition to Motion for Stay of this Court's Order of December 19, 1980.

2. In Opposition—February 5, 1981, Board's Response to State's Motion to Stay Order of December 19, 1980 and to State Report under Paragraph 12(a).

3. In Opposition—February 12, 1981, Adams, Plaintiff-Intervenor's Memorandum in Opposition to All Motions for Stays and Further Delays.

4. In Support—February 4, 1981, Suggestions of the Special School District[1] of St. Louis County in Support of State Defendant's Motion to Stay the Order of the Court of December 19, 1980.

On February 2, 1981, State defendants filed a Report Pursuant to the Court's Order of December 19, 1980. The Report states in part that State defendants are unable to

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[1]The Special School District is itself resisting an order of the Eighth Circuit Court of Appeals to integrate vocational schools. ("We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year." *Liddell* v. *Board of Education of the City of St. Louis, supra,* slip op. at 19.) *In re Special School District of St. Louis County,* No. 80-1456 (8th Cir., Aug. 15, 1980) (denying petition for writ of prohibition), reh. den. (8th Cir., Sept. 10, 1980). *See also Special School District of St. Louis County* v. *Mallory,* No. 80-876-C(5) (E.D. Mo., Sept. 23, 1980) (dismissing request for injunction and declaratory judgment); *Special School District* v. *Mallory,* No. 80-1155-CV-C (W.D. Mo., filed July 1, 1980) (petition for injunction and declaratory judgment).

file a "meaningful, workable, voluntary plan which is educationally sound," because State defendants were unable to gather necessary data and information due to the threat of future interdistrict litigation.

On February 13, 1981, the Eighth Circuit Court of Appeals denied State defendants' motion for a stay of Judge Meredith's December 19, 1980, order. State defendants filed a notice of appeal of the December 19 ruling to the Eighth Circuit Court of Appeals on February 17, 1981. Notice was filed without a request for certification by the district court under 28 U.S.C. § 1292.

Eighth Circuit Court of Appeals Opinion: February 13, 1981

The Eighth Circuit Court of Appeals upheld Judge Meredith's May 21, 1980, Order, stating:

> We note that the district court has found it necessary to extend the deadlines for filing the proposed plans under paragraph 12(a)-(c) and that it is apparently having some difficulty in getting complete and adequate proposals from the parties. We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop and implement the plans contemplated by paragraph 12. It is imperative that the district court countenance no excuse for further delay.

Liddell v. *Board of Education of the City of St. Louis, supra*, slip op. at 20 n.6.

On February 26, 1981, this Court denied the motion which State defendants filed on January 28, 1981, for a Stay of Judge Meredith's December 19, 1980, order. Judge Meredith's order required defendants to file a plan on February 2, 1981, and a report on March 2, 1981.

II. *Grounds for Contempt Proceedings.*

The foregoing public record reveals extraordinary machinations by the State defendants in resisting Judge Meredith's orders. In these circumstances, the Court can draw only one conclusion. The State has, as a matter of deliberate policy, decided to defy the authority of the Court.

Let there be no misunderstanding. This is not a simple case of a private litigant failing to take proper measures to comply with the Court's orders. This case is quite different. The public interest is involved to a much greater extent when a party's actions serve to undercut the implementation of the Court's desegregation orders. *See Morgan* v. *McDonough*, 540 F.2d 527, 533-34 (1st Cir. 1976), affirming the district court's power to fashion an extraordinary remedy to deal with intransigent and obstructionist officials who failed to engage in cooperative, voluntary efforts and continuously resisted desegregation in a pattern of defiance and delay.

The constitutional dimensions, so important and so far-reaching in dealing with the rights of children and their parents and guardians in school desegregation cases, demand full respect of the federal court system. *See Harvest* v. *Board of Public Instruction of Mantee County, Florida*, 312 F.Supp. 269, 274-75 (M.D. Fla. 1970), denying a motion to stay a mandatory injunction requiring school desegregation.

To grant the State defendants a stay would permit the State to escape triumphantly from the consequences of its definance of Judge Meredith's orders. If the State's position rests on a correct view of the law, it follows that the law can be flouted and brought into disrepute by the defendants with impunity.

The Court would be doing much less than its duty if the State defendants were not held accountable for their

actions. Where there has been willful disobedience to an order of the court and a measure of contumacy on the part of the defendant, inveterate principles of both equity and the common law mandate that the Court exercise jurisdistion to punish for contempt of court. *See* 8 *Halsbury's Laws of England* 20 (3d ed. 1968), delineating the punitive jurisdiction of court's contempt power as founded upon the good, not of the plaintiffs or of any party to the action, but of the public.

The power to punish for contempt is a drastic remedy. Contempt jurisdiction should be exercised with the greatest caution. If this Court's orders are complied with, there will be no need for contempt proceedings. If they are not executed, the Court will order the State defendants, the City Board of Education and the United States to show cause why they should not be found in contempt.

III. *Avoidance of Contempt Proceedings Compliance with Court Orders*

The State defendants, in conjunction with the Board of Education of the City of St. Louis and the United States, [the Polities], shall comply with Judge Meredith's orders within sixty days of the date of this order, with an interim progress report to be filed within thirty days. If the Polities, jointly and/or individually, fail to comply, this Court may accept plans submitted by any parties to this suit or by a Special Master and/or a Review Panel appointed by this Court. Failure of State defendants, the City Board of Education, and the United States to submit an interim plan in compliance with this order within thirty days can result in the issuance of an order of contempt.

Failure of the Polities to submit a plan jointly and/or individually, will leave this Court no alternative but to initiate contempt proceedings against the recalcitrant Polity or Polities. This Court will be left no alternative but to

adopt a plan to remedy the effects of constitutional violations. The power of the Court in this regard is well established. *See Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."); *Morgan* v. *McDonough*, *supra* at 533 ("A district court's power to fashion and effectuate desegregation decrees is broad and flexible and the remedies may be 'administratively awkward, inconvenient, and even bizarre.' *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 15-16 (1971)."); *Morgan v. Kerrigan*, 509 F.2d 599, 600 (1st Cir. 1975) ("The district court found pervasive violations of the constitutional rights . . . . The court's obligation is to rectify those violations, availing itself in so doing of the breadth and flexibility inherent in equitable remedies."); *Davis* v. *School District of the City of Pontiac, Inc.*, 487 F.2d 890, 891 (6th Cir. 1973) ("Once a past constitutional violation has been established, 'the scope of a district court's equitable power to remedy past wrongs is broad . . . .'"); *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 755-56 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) ("Having found a violation, the court has broad equitable powers to order changes designed to eliminate future misconduct and to reduce the effect of prior violations. . . . That a decree may require expenditure of public funds is no bar to corrective action."). *See also* Berger, Curtis J., *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978) (delineating the extensive role delegated by the court to a special master in *Hart* v. *Community School Board of Brooklyn*, *supra*, to design a plan to desegregate schools in south Brooklyn, New York).

In order to ensure that a plan is in fact produced in a timely manner for this Court's consideration,

IT IS HEREBY ORDERED that Edward T. Foote, Chairman of the Desegregation Monitoring and Advisory Committee, shall prepare and file a plan by March 27, 1981, in accordance with Judge Meredtih's orders of May 21, 1980, paragraph 12(a) and December 19, 1980.

IT IS HEREBY FURTHER ORDERED that Dr. Gary Orfield, the court appointed expert, shall review the study as submitted by the Chairman within ten days following filing of such plan, and report to the Court his findings and recommendations.

IT IS HEREBY FURTHER ORDERED that nothing herein relieves the obligation of the Polities to comply with the orders of Judge Meredith.

IV. *Board's Motion to Stay Discovery*

The Eighth Circuit Court of Appeals, on February 13, 1981, stated: "We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year." *Liddell* v. *Board of Education of the City of St. Louis, supra,* slip op. at 19.

In an effort to facilitate and expedite voluntary and cooperative planning, this Court grants a stay of discovery for a period of sixty days from the date of this order, except insofar as discovery relates to the Special School District and requirements under paragraph 12(b) of Judge Meredith's May 21, 1980, order.
Therefore,

IT IS HEREBY ORDERED that discovery is stayed for a period of sixty days from the date of this order, except insofar as discovery relates to the Special School District and requirements under paragraph 12(b) of Judge Meredith's May 21, 1980, order.

V. *Protective Order*

The Protective Orders issued by Judge Meredith on June 17, 1980, and October 6, 1980, remain in full force and effect, to-wit:

> IT IS HEREBY SPECIFICALLY ORDERED that nothing any of the parties may do pursuant to these previously mentioned Orders will in any way prejudice their position on appeal and they will be deemed to have done such actions under order of the Court.
>
> * * *
>
> IT IS FURTHER ORDERED that any school district of St. Louis County that enters into a plan of voluntary cooperation with the School Board of the City of St. Louis will not in any way prejudice its legal rights to oppose or resist a suit or orders requiring compulsory cooperation.

And,

> IT IS HEREBY SPECIFICALLY ORDERED that nothing any of the parties may do pursuant to the order of this Court of September 17, 1980, will in any way prejudice their position on appeal and they will be deemed to have done such actions under order of the Court.
>
> * * *
>
> IT IS FURTHER ORDERED that any school district of St. Louis County that enters into a plan of voluntary cooperation with the School Board of the City of St. Louis will not in any way prejudice its legal rights to oppose or resist a suit or orders requiring compulsory cooperation.

In order to facilitate cooperative and voluntary planning in this suit, the Court emphasizes that:

IT IS HEREBY FURTHER ORDERED that any settlement discussions, negotiations, proposals, or responses to proposals arising in connection with the development of a voluntary cooperative desegregation plan shall not be used in evidence in this case.

Dated this 4th day of March, 1981.

William Hungate
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	**No. 72-100C(4)**

ORDER

This matter is before the Court following a hearing on one aspect (known as the 12b section) of this lengthy school desegregation action—desegregation of vocational education in the City of St. Louis and St. Louis County. This decree is made and entered into pursuant to prior orders of this Court, the Eighth Circuit Court of Appeals, and the stipulation of facts entered into by parties hereto.

1. This school desegregation action was initiated as a class action on February 18, 1972, and detailed histories of the case are set forth in this Court's opinions of *Liddell* v. *Bd. of Ed. City of St. Louis, etc.*, 469 F.Supp. 1304 (E.D. Mo. 1979); *Liddell* v. *Bd. of Ed. of City of St. Louis, Mo.*, 491 F.Supp. 351 (E.D. Mo. 1980); and in the opinions of the Court of Appeals. *See Liddell* v. *Caldwell*, 546 F.2d 768, 769 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Adams* v. *United States*, 620 F.2d 1277, 1281-84 (8th Cir. 1980); and *Liddell* v. *Board of Education of the City of St. Louis*, No. 80-1458 (8th Cir., Feb. 13, 1981).

The subject matter of this order concerns the integration of area vocational schools of the City of St. Louis and the Special School District of St Louis County, and the delivery of educational services to secondary school students at those schools and in community based or magnet vocational programs.

2. This Court has jurisdiction of the subject matter of this class action, has jurisdiction over all the parties, and hereby enters this judgment and decree.

3. This order is made pursuant to paragraph 12b of Judge Meredith's order herein of May 21, 1980, as amended, providing:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows . . . .
>
> b. To develop and submit to the Court . . . a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis for implementation in the 1981-1982 school year. *Liddell, supra,* 491 F.Supp. at 353.

This order is further made pursuant to the directive of the Court of Appeals approving paragraph 12b of Judge Meredith's opinion of May 21, 1980, and affirming Judge Meredith's order of May 21, 1980.

The Eighth Circuit Court of Appeals held:

> Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court specifically found that the State of Missouri's establishment and maintenance of the separate

> Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." . . . Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit. We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year. *Liddell* v. *Board of Education*, No. 80-1458, slip op. at 19.

4. The Special School District of St. Louis County was added as a party defendant to this cause on September 12, 1980, upon motion of the Caldwell plaintiff-intervenors.

On May 4, 1981, stipulations of fact were filed with this Court signed by all parties except the Liddell plaintiffs. On May 20, 1981, Liddell consented to the stipulation of facts so that it has been executed by all parties hereto.

On December 15, 1980, pursuant to paragraph 12b, the St. Louis Board of Education and the State defendants submitted proposed plans concerning vocational educational programs in the City and County. The St. Louis Board proposed expanding the Special School District's boundaries to include the City of St. Louis to serve both the vocational and special education needs for the City of St. Louis and St. Louis County. The proposal recommended as a desegration goal a ratio of two white students to one black student at each traditional site involved, and the implementation of community-based and magnet vocational programs. To implement the City Board's proposal the Board proposed that the Court appoint a nine-member board of education for the district and empower the nine-member board to levy a tax of $.55 to support the basic cost

of vocational and special education. The effect of the levy would be to increase the tax rate in the City of St. Louis by $.55.

The State defendants' proposal suggested that the St. Louis Board and the Special School District (1) initiate at least twenty percent of their offerings on a half-day basis; (2) give consideration to operating the program at O'Fallon and at North and South Technical Schools as well as other unused schools on a three session per day year-round basis; and (3) initiate joint community-based programs. Student transfers between the City Board and the Special School District programs would be on a voluntary basis. No specific desegregation goals were contained in the proposals, and the implementation of the plan as submitted would require increased expenditures by the St. Louis City Board and the Special School District.

The Special School District was not, under paragraph 12b, *supra*, required to submit a plan to the Court, but did submit a proposal on March 24, 1981. The substantive portion of that proposal concerned placing City students in the Special School District's vocational programs in prescribed numbers under certain conditions, and was not specifically designed to address desegregation at O'Fallon Technical School.

On March 4, 1981, the Court set a hearing to begin May 11, 1981, to consider the issues concerning the Special School District and established pretrial procedures for the hearing. On subsequent dates the Court established the agenda for the hearing and the order for the presentation of the issues and evidence.

On May 8, 1981, the Special School District lodged another proposal with the Court. That proposal served as a basis for extensive negotiations which resulted in a proposed consent decree supported by a majority of the parties

and also a plan agreed to by all of the parties except the intervening plaintiffs, Adams.

On May 11, 1981, the Court duly convened for the scheduled hearing. The parties advised the Court they were "embarrassingly close" to reaching a settlement on the vocational education (12b) issues. In response to the parties' requests, the Court deferred the proceedings. Upon the parties' progress reports to the Court, the hearing was continued on a day-to-day basis to accommodate the ongoing settlement negotiations until the parties reduced a proposal into writing and, on May 20, 1981, submitted to the Court a proposed vocational education plan, funding order, and consent decree.

On May 21, 1981, the Court conducted a hearing. Without objection, the Court admitted into evidence the stipulations of fact, as supplemented, and exhibit nos. 1-39 and 41-44 (document no. 40 does not exist) offered by the United States. All parties were provided an opportunity to be heard. The Court issued its funding order and made the proposed consent decree and plan a part of the record.

Parties were notified on May 27, 1981, that a hearing would be held beginning June 9, 1981, on the proposed 12b consent decree. A Notice to Class was filed of record, served by publication and duly posted at all schools operated by the City School Board and at all Special School District schools, on May 27, 1981. Interested individuals were granted until June 8, 1981, to request leave to appear in support or opposition to the proposed decree or to file written memoranda stating their positions. No individual, other than the Adams plaintiffs-intervenors, filed written requests for leave to present opposing testimony and argument. On May 26, 1981, the Adams plaintiffs filed revised objections to the consent decree. The Liddell plaintiffs orally requested leave to argue in opposition to the proposed decree, but did not

request leave to present testimony thereon. Only three letters were received from members of the public which were duly filed, considered by the court, and made a part of the record. Also filed by the attorneys for the school district of University City was a memorandum of comments and suggestions to the Plan. The comments made have either been considered and rejected by the parties, or the suggestions were in fact dealt with in the Plan.

The parties have, in numerous filings with this Court, the Court of Appeals, and the United States Supreme Court, stated their positions as to the facts and law regarding the issues. In the proposed consent decree submitted to the Court, the parties recited that

> By consenting hereto no party retracts its previous positions or concedes that its respective positions are in any way erroneous. However, the parties being desirous of implementing a solution to the issues concerning paragraph 12(b) of the May 21, 1980 order without the expense of litigation, have agreed to the entry of the decree, and the Court being of the opinion that the entry of this decree will effectuate federal law . . . ."

The City of St. Louis, the United States, the Caldwell plaintiffs-intervenors, and the Special School District support the consent decree without equivocation. The Board of Education of the City of St. Louis supports the decree in accordance with the funding order entered on May 21, 1981. The State has executed the consent decree and approves the vocational plan, but is critical of the funding order. The Liddell plaintiffs approve the plan, but withheld approval of the consent decree, questioning the adequacy of the jurisdictional statement in the first paragraph. The intervening plaintiffs, Adams, object to the plan and the decree.

5. Traditionally a "consent decree" is in the nature

of a contract which is sanctioned by the Court as to what decision should be made. *See* discussion in 30A C.J.S., *Equity*, § 678 (1965). Recently, however, it has been held, at least in some decisions, that consent of all the parties is not required for a valid consent decree.

> Unless [a non-consenting party] can demonstrate that it has been ordered to take some action by the decree, or ordered not to take some action, or that its rights or legitimate interests have otherwise been affected, it has no right to prevent the other parties and the Court from signing the decree.

United States v. *City of Miami, Fla.*, 614 F.2d 1322, 1329 (5th Cir.), *reh. granted*, 625 F.2d 1310 (1980). The Court finds that the intervening plaintiffs, Adams, are not ordered to take action or to desist from any action by reason of the decree and the Court finds that their rights or legitimate interests have not been affected hereby.

Notwithstanding the holding in *Miami* on which rehearing was granted, the Court is reluctant under circumstances here to enter an order and judgment as a "consent decree." Not all of the parties have consented to the decree, although it has been approved by a majority thereof. The plan has been approved by all the parties except intervening plaintiffs, Adams. Therefore, the Court hereby adopts the Vocational Education Plan agreed to by seven of the eight parties as its plan to desegregate the vocational schools in the City of St. Louis and St. Louis County. The plan is attached hereto and made a part of this order.

6. At the conclusion of the scheduled evidentiary hearing on the proposed consent decree, funding order, and plan, on June 9, 1981, and after all parties were afforded an opportunity to be heard thereon, the Court finds that the Vocational Education Plan attached hereto is fair, reasonable, adequate and satisfies constitutional require-

ments to integrate the vocational schools in the City of St. Louis and St. Louis County, and conforms to the guidelines of the Eighth Circuit. The Court is satisfied that under the totality of the circumstances, the vocational plan is fair, reasonable, and adequate. *Armstrong* v. *Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980). The Plan calls for a full measure of desegregation and conforms to a level of constitutional compliance. It contains racial goals reflective of the overall black-white student ratios in the two districts. It contains mechanisms for achieving these racial goals. Under the totality of the circumstances, the Court orders the attached plan implemented inasmuch as any student in a vocational school may return to his or her regular high school at will. Vocational education in Missouri is voluntary. A program of vocational education need not be offered, but if it is offered it must be done in a nonsegregative manner. By approving the plan, it facilitates the implementation of a quality educational program in a desegregative atmosphere. The Court adopts the plan as its own because school desegregation is one of those areas in which voluntary resolution, if possible, is preferable to full litigation. *Armstrong, supra*, 616 F.2d at 318; *Mendozo* v. *United States*, 623 F.2d 1338, 1345 (9th Cir. 1980).

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Court approves of the attached Vocational Education Plan for the Boards of the City of St. Louis and the Special School District of St. Louis County and adopts the Plan as its own.

2. The Special School District of St. Louis County, the Board of Education of the City of St. Louis, and the State of Missouri are ordered to implement the Plan forthwith.

3. By April 1 of each school year, the Metropolitan Coordinating Committee described in the Plan shall file with the Court an annual plan, approved by the respective Boards, which shall describe the various steps to be taken to reach the goals indicated in the Plan for the next school year.

4. If any party objects to an annual plan or to any provision of an annual plan submitted to this Court as required in paragraph 3 of this order, that party must file notice of the objection with this Court within thirty days from the date the plan is filed with this Court. If objections are filed, a hearing will be set on the objections at a subsequent date.

5. The progress made in implementing the plan will be reported by the Committee to the Court pursuant to page seven of the attached plan. Additional data reports shall be filed on October 31, 1981, and on March 31, 1982, and on the same dates annually thereafter until further order of the Court. The reports shall contain:

A. The following information by home district, grade level, program and race:

(a) The number of students enrolled in each school or site;

(b) The number of students assigned since the last report to a school or site other than his/her first choice for the purpose of achieving racial goals, and the number who did not accept the assignments.

B. The number of slots available for juniors and seniors at each school or site.

C. A description of the recruitment activities undertaken by either Board or the Committee since the previous report.

D. A description of the measures taken since the last report by each district to achieve parity.

E. All programs moved from one district to another, and the teachers assigned by race, to such moved programs.

F. All unduplicated and magnet programs developed since the last report and their locations.

G. Brief description of any present or proposed construction of expansion of vocational education facilities.

H. Statement whether either District has sold or abandoned any vocational education facility, equipment, or supplies having a total value of more than $500.00 since the previous report.

6. After the completion of the 1985-86 school year, the Court will review the progress made and assess whether the goals of the plan have been met. In the event the goals are not met, upon motion of a party, and after a hearing, the Court may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify the plan attached hereto, or adopt any other plan in accordance with paragraph 12b of the May 21, 1980, order.

The Special School District, the City Board of Education, the United States, and the State of Missouri shall submit an interim report by July 15, 1983, on the success of implementation for the Court's evaluation and recommendation, and for the Court's action, if any, as appropriate.

7. Funds to meet the commitments of the State defendants to the plan approved herein shall be made available by the State defendants and the Missouri General Assembly subject to and in compliance with any applicable provisions of law.

8. No party has consented to the award of litigation costs and/or reasonable attorneys' fees. This matter is reserved for such further negotiations and/or proceedings, including applications to the Court, as may be appropriate following the Court's approval of this decree.

9. All previous orders of this Court not inconsistent herewith remain in full force and effect.

10. In order to establish vocational programs in ninth and tenth grades at regular comprehensive high schools, it is necessary for the City Board to develop, equip, and/or renovate buildings for General Shop, Business Education and Industrial Arts programs at those schools. Additional operating costs such as additional teachers may also be necessary to effectively implement these programs.

There are State of Missouri designated funds allocated for the 1980-81 St. Louis Desegregation Budget which have not been spent in the 1980-81 school year. There are also ESAA funds which have been approved for particular programs for the 1980-81 school year which will not be spent in the 1980-81 school year. The reprogramming of these ESAA funds required the Board of Education of the City of St. Louis to apply immediately for and receive such permission from the United States Department of Education. Therefore, IT IS HEREBY ORDERED that

A. The Board of Education of the City of St. Louis shall establish during the term of the consolidated vocational technical education plan and continuing thereafter vocational programs in General Shop, Business Education and Industrial Arts for grades nine and ten in its regular comprehensive high schools.

B. The Board of Education of the City of St. Louis shall continue to act promptly on its application to the Department of Education to rededicate ESAA funds which

have been approved for particular programs for the 1980-81 school year but which will not be spent in the 1980-81 school year in order to fund costs for the development, equipment, renovation and operational costs for the City Board's vocational programs.

C. One Million Dollars ($1,000,000.00) of State of Missouri designated funds allocated for the 1980-81 St. Louis Desegregation Budget which have not been spent in the 1980-81 school year will be placed in a separate account in order to pay for such costs.

D. The Board of Education of the City of St. Louis shall reimburse the State for State funds identified in subparagraph C above, spent to the extent that monies are available at the end of the 1981-82 school year from the City Board's Debt Retirement Fund which are not otherwise restricted by prior Court order or necessary for the retirement of the City Board's debt. If the City Board has no such funds, the State shall continue to pay such costs from the funds identified in subparagraph C above.

E. If the above funds are still insufficient to develop, equip, renovate and operate these vocational programs, then the remainder of the unspent State designated monies existing in the 1980-81 Desegregation Budget shall be utilized as necessary.

11. During the phase out of ninth and tenth grade students from O'Fallon Technical High School to comprehensive high schools in the City of St. Louis, the State funding allocated for such programs during the school year of phase out shall be paid to the Board of Education of the City of St. Louis for vocational education related matters. Said funding to the City Board shall continue each year thereafter. State defendants have agreed to this provision.

12. The Court recognizes that the Special School District has previously budgeted two million dollars ($2,000,000.00) for equipping West County Technical High School which will open in Year Two of the 12b plan for consolidated vocational programs. Much of this equipment will be used at the discretion of the Metropolitan Coordinating Committee for unduplicated programs under the consolidated program plan.

13. All costs concerning the implementation of the vocational programs shall be subject to review by this Court if any party disputes any of these costs as not being reasonable or necessary for the implementation of this order.

14. In the event that the Board of Education of the City of St. Louis is unable to fund the development, equipment and/or renovation costs and operational costs for its vocational programs from the above sources or with current desegregation budgeted revenues, the Board of Education of the City of St. Louis shall apply to the Court for such appropriate orders as may be necessary to secure additional funds essential for such purposes.

15. As to those dates on the implementation schedule which are now past, the action required thereunder shall be taken within ten days of the date of this order and be effective nunc pro tunc.

16. This Court retains jurisdiction of this action for all purposes including the entry of such additional orders as may, from time to time, be necessary and proper.

Dated this 11th day of June, 1981.

William Hungate
United States District Judge

VOCATIONAL EDUCATION PLAN FOR THE BOARDS OF EDUCTION OF THE CITY OF ST. LOUIS AND THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY

1. Primary governance of the consolidated vocational-technical school programs* of the Board of Education of the City of St. Louis (hereinafter "City Board") and the Board of Education of the Special School District of St. Louis County (hereinafter, "Special District") will remain vested in each of the two existing Boards of Education, respectively. This vested authority is the policy decision making responsibility of the respective Boards including but not limited to the operation of the respective programs, employment of staff, development of personnel and appropriation of funds to meet the district's needs.

The plan is continuing in nature and the initial period of the plan will be five years.

2. This plan will be administered by a Metropolitan Coordinating Committee, hereinafter referred to as "the Committee", composed of two staff persons from the vocational department of the City School District and two staff persons from the vocational department of the Special School District. It is recommended that the chief administrative vocational officer and another vocational staff member in each district be selected to serve on this Committee. Selection will be made by the Boards of the respective districts. A fifth member will be appointed by the State Board of Education and will function in the role of an advisor and resource person, and as a tie breaker if

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*This includes O'Fallon, North, South, West and other sites as needed for a community-based or magnet vocational-technical program. Not included are comprehensive high school, middle and elementary vocational or pre-voc programs.

the four other representatives are unable to reach a decision. The State Board representative has a primary responsibility for seeing that the desegregation requirements of this plan are met.

The term of membership of the four vocational representatives shall be for the duration of the plan. Removal of any local representative may only be done with the approval of the Court upon motion of a party.

3. The Committee, in conjunction with the two Boards and with such consultant help as the Committee deems necessary, will develop a Memorandum of Understanding to be entered into by each respective Board. Such Memorandum will provide operational guidelines under which the committee will function with respect to but not limited to such items as:

—Teacher assignment (See paragraph 14)

—Teacher recruitment for vacancies

—Teacher grievance procedures

—Teacher evaluation procedures

—Student application and selection process and criteria

—Student discipline procedures

—Student grievance procedures

—Program development, assessment, revision procedures

—Budget and financial process, procedures and commitment

—Staff development and training to function effectively in a fully desegregated program

—Transportation

—Other items as may be pertinent and necessary for successful administration

The Memorandum of Understanding, upon approval, will be submitted to the Court as an addendum to this plan.

4. The responsibilities of the Committee include, but are not limited to all planning activities and decisons that are a direct result of this plan and necessary to its administration such as:

—Determination and location of programs and offerings

—Student recruitment, selection criteria, and assignment

—Program review, evaluation and revision as needed

—Development and recommendation of budget

—Development and location of any new program, schools or program sites

—Recommendation for any alternative use of existing facilities

—General program administration, operation and maintenance

The Committee will elect a chairperson and a secretary. The chairperson will be responsible for convening the Committee. The Committee will be responsible for keeping a complete record of proceedings and communicating decisions and other information to the appropriate parties.

The Committee will hire an Executive Director, following regular hiring practices of the two Boards insofar as possible, to assume administrative responsibility for program operations. The Executive Director will serve as chief administrative officer to carry out the procedures and programs developed by the Committee. The Executive Director will be an ex-officio, non-voting member of the Committee. The cost of the Executive Director will be paid by the two districts and the State Department of Elementary and Secondary Education in three equal shares.

Matters such as time, dates and places of meetings can be determined at the initial meeting of the Committee. The nature of this plan and the formation of a Committee for vocational education in the Metropolitan St. Louis Area could require professional assistance. Therefore, a small, but adequate budget should be established to hire consultants and to reimburse Committee representatives for out-of-pocket expenses in the performance of their responsibilities. The State will provide the funds for a consultant while the districts reimburse their respective appointees for out-of-pocket expenses.

5. A two member, bi-racial monitoring team will be appointed by the Court, based on recommendations of the Committee and the parties. The team shall consist of experts in vocational education who are in no way connected with the Districts and will conduct two on-site visits of no less than three days each during each of the initial five years. The monitoring team will be charged with the responsibility of assessing the degree to which the plan is successful and will make recommendations to the Committee where appropriate. The team will report to the Court and to the respective Boards any situations, conditions, or problems which appear to impede successful plan implementation which the Committee is unable to correct or solve.

6. The Committee will use the services of the existing vocational advisory committees, which are biracial and reflect a cross section of the community including representatives from business, industry and unions, to provide citizen input, assessment and advice related to each vocational program.

7. At the beginning of the fifth year (1985-1986) it is a goal of the plan to have at each of the four technical schools—North County Technical, South County Technical,

West County Technical and O'Fallon—a racial balance of 65% white and 35% black, with 10 percentage points leeway up or down.

8. In each year the total number of County students placed in City Board and Special District programs may not exceed the total slots available and approved for juniors and seniors in the Special District Technical schools and other developed sites and the total number of City students placed in City Board and Special District programs may not exceed the total slots available and approved for juniors and seniors at O'Fallon and other developed sites. Within this closed system, however, these numbers may change as total program slots in either district are increased or decreased equitably as approved by the Committee. It is the goal of both Districts to significantly increase vocational education opportunities in integrated settings. The Committee will attempt to improve programs by either expanding or contracting offerings, based on need, to the extent that an equal number of additional or reduced slots will be allocated to the City Board and the Special District, and that new programs will follow the 65% white—35% black (plus or minus 10 percentage points) guidelines.

9. After Year 2 of the plan no fee for vocational training will be charged by one district to the other since it is contemplated that the same number of County students will be attending O'Fallon as City students are attending Special District vocational schools. During Years 1 and 2 fees for vocational training will be paid by the respective Districts only for the incremental costs incurred by those Districts for the provision of this first year's instruction of exchange students, and every effort will be made to absorb such students at no cost.

10. Significant recruitment activities for the consolidated vocational technical programs will be undertaken by the Committee and the respective Boards to assure the achievement of the racial balance goals projected.[1] Recruitment will include open houses, mass mailings to parents of the 9th and 10th graders in the metropolitan area, feature newspaper stories, school visits, etc. A major portion of the recruitment activities during the first year will center around the development of recruitment materials for distribution. The responsibility for the development of recruitment materials and methods should be contracted out with the costs being reimbursed by the State.

11. For *duplicated* programs (those which are offered at more than one school site) students will be given their first or second choice program, but in year two and subsequent years such program choice may be at a school other than the student's first choice for the purpose of achieving racial goals. Where the school site is other than the students first choice, the goal of racial balance of the classroom assignment will be 65% white and 35% black, with 10% leeway up or down. Where a student does not wish to accept a site other than his first choice, he is free to remain in his local high school.

12. Funding for new equipment for unduplicated programs will be provided by the State except to the extent that funds of either district have already been earmarked for such new programs. Wherever possible unduplicated programs will be developed from existing equipment, and the Committee will allocate such programs between the two districts so that neither district is burdened with such program equipment cost unfairly. Where existing equipment is used, the State will be responsible only for the costs due to relocation and modification of the equipment or buildings.

13. Parity of program quality will be essential to attract students and to operate on a non-tuition basis. During Year 1 of the plan the Special District and the City Board will each prepare the State form entitled "Guide for Computing Fees for Secondary Students Enrolled in Secondary Schools Designated as Area Vocational Schools". The information will be used as a guide by a consultant hired by the Committee for determining what steps are necessary, if any, to place the programs of each district on a parity for Year 3. Each district will improve or upgrade the physical aspects of any program or facility to reach parity.

No increased costs of the City Board attributable to the achievement of parity between the vocational education programs of the City Board and those of the Special District shall be paid by the Special District. Similarly, no increased costs of the Special District attributable to the achievement of parity between the vocational education programs of the City Board and those of the Special District shall be paid by the City Board. In the event that either Board is unable to fund any increased costs from current revenues including its desegregation funds or from other conventional sources, upon certification by the Committee that such costs and expenses are essential to the implementation of this plan, either Board shall apply to the Court for such appropriate orders as may be necessary to secure additional funds essential for such purposes.

14. Teachers will be encouraged to accept reciprocal visiting professorships between districts and to develop opportunities for team teaching. As the plan evolves, should a program be moved by the Committee from one district to another, the teacher will have the opportunity to follow that program and teach it at the new site. The teacher would have the option to remain an employee of

the sending Board or become an employee of the receiving Board. In the event there is an opening in the Special District vocational program for which a displaced City Board vocational teacher is qualified, the Special District would give the qualified City Board teacher preference. Reciprocally, if a Special District vocational teacher is displaced and an opening exists in the vocational program of the City Board, the qualified Special District teacher would have preference over all other applicants. The districts will provide a one-step salary incentive for teachers who transfer voluntarily to the other District if the transfer decreases racial concentrations.

15. The Committee will immediately initiate a study of courses offered at the comprehensive high schools in the city and county to identify ways of reducing duplication of programming between such high schools and the four vocational schools.

16. After the completion of the 1985-86 school year, the Court will review the progress made and assess whether the goals of this plan have been met. In the event the goals are not met, upon motion of a party, and after a hearing, the Court may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify this plan, or adopt any other plan in accordance with paragraph 12(b) of the May 21, 1980 order.

17. Scheduling enunciated in this plan is not intended as limiting. If goals can be achieved earlier than indicated, nothing in this plan is intended to preclude such result.

For the first year of operation steps will immediately be taken toward completion of the following activities in accordance with the schedule set out below:

IMPLEMENTATION SCHEDULE

	Activity	*Completion Date*
1.	Appoint Metropolitan Coordinating Committee	May 29, 1981
2.	Initiate search for Executive Director	May 29, 1981
3.	Initial strategies developed for fall '81 programming and student assignments	June 15, 1981
4.	Implement initial strategies	June 17, 1981
5.	Initiate study of comprehensive high school programs	June 19, 1981
6.	Complete rough draft of Memorandum of Understanding and submit to both Boards	June 22, 1981
7.	Board Review of memorandum	July 1, 1981
8.	Revise Memorandum as needed	July 15, 1981
9.	Submit Memorandum to Boards for ratification	August 1, 1981
10.	Detailed strategies developed for '81-'82	August 3, 1981
11.	Hire Executive Director	August 3, 1981
12.	First monitoring team visit	August 28, 1981
13.	Implement fall strategies	Sept. 1, 1981
14.	File preliminary progress report with Boards and Court	Sept. 15, 1981
15.	Complete comprehensive high school study	Nov. 2, 1981

16. Specific strategies developed for Year 2—1982-83 — March 1, 1982
17. Board review and approval of strategies — March 15, 1982
18. Second monitoring team visit — March 19, 1982
19. Submit Year 2 plan to Court with progress report to date — April 1, 1982
20. Implement Year 2 strategy plan — April 5, 1982
21. Monitoring team visit — Nov. 1982
22. Repeat steps 16—21 each year — continuing

By April 1 of each school year, the Committee will file with the Court a plan, approved by the respective Boards, which describes the steps to be taken to reach the goals indicated herein for the next school year, and a progress report of accomplishments, including findings of the Monitoring Team.

IMMEDIATELY—(Prior to the end of the 1980-81 School Year and Summer)

1. Draft agreement.
2. Boards and parties ratification of agreement, and the submission to the Court for approval.
3. Establish Metropolitan Coordinating Committee.
4. Draft and ratify Memorandum of Understanding.
5. Special District and City Board recruitment of City and County students for interdistrict transfers for Fall.
6. Each District fill out State's "Guide for Computing Fees . . . ".
7. Review organization of City and Special District Vocational Departments to insure ability to respond to and implement plan.

YEAR 1—1981-82

IMPLEMENTATION:

1. Expected racial distribution of 85% white and 15% black in Special District Technical Schools.
2. Continue and increase public relations campaign and recruitment.
3. Assure that no student will be displaced from on-going program.
4. Initiate community-based programs[2] of business office education and urban agriculture. (need state approval) Racial balance goal is 65% white and 35% black, but with 10 percentage points leeway up or down.
5. Initiate half day programs at North County Technical and South County Technical.
6. Cosmetic improvements at three present technical schools.

PLAN:

1. Develop nine unduplicated programs for initiation in Year 2.
2. Develop and seek funding for three additional community based programs for initiation in Year 2.
3. Develop common or cooperative metropolitan placement service.
4. Define relationship between Special District and City Board recruitment. Develop common or cooperative approaches.
5. Evaluate City Board and Special District programs for changes for Year 2. Duplicated programs must be of comparable quality and substance. Plan for complete parity by Year 3.

6. Develop programs, staff and equipment for West County Technical.

7. Revise curriculum for Special District occupational orientation to include exposure to City Board offerings.

Available Slots: City Board 970

Special District 2500

YEAR 2—1982-83

IMPLEMENTATION:

1. Expected racial distribution of 82% white and 18% black in Special District technical schools.

2. Initiate unduplicated programs at O'Fallon with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.

3. Open West County Technical and initiate unduplicated programs with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.

4. Placement of the nine unduplicated programs referred to in paragraphs 2 and 3 above will be determined by the Committee.

5. Initiate half day programs at O'Fallon.

6. Expected racial distribution of 10-15% white and 85-90% black at O'Fallon.

7. Initiate three additional community based programs.

8. Establish common or cooperative placement service.

9. Establish common or cooperative recruitment and counselling service.

10. Initiate revised occupational orientation in Special District.

PLAN:

1. Develop three additional unduplicated programs for initiation in Year 3.
2. Develop and seek funding for two additional community based programs for initiation in Year 3.
3. Evaluate all City Board and Special District programs for changes for Year 3.
4. Develop programs, staff and equipment for 2nd year (Year 3 of plan) at West County Technical.
5. Necessary steps to insure full parity by Year 3.

Available Slots Projected: City Board 1150

Special District 2800

YEAR 3—1983-84

IMPLEMENTATION:

1. Expected racial distribution of 78% white and 22% black in Special District technical schools.
2. Expected racial distribution of 50% white and 50% black at O'Fallon.
3. Initiate three additional unduplicated programs with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.
4. Initiate second year programming at West County Technical.
5. Initiate two additional community based programs.
6. Continue and adjust public relations and recruitment.
7. O'Fallon will initiate 10th grade Occupational Orientation magnet program for City students with goal of 50% white and 50% black.

PLAN:

1. Develop one additional unduplicated program for initiation in Year 4.

2. Evaluate all City Board and Special District programs for initiation in Year 4.

Available Slots Projected: City Board 1300

Special District 2950

YEAR 4—1984-85

IMPLEMENTATION:

1. Expected racial distribution of 75% white and 25% black in Special District technical schools.

2. Expected racial distribution of 65% white and 35% black at O'Fallon.

3. At least thirteen unduplicated programs will be in operation.

4. West County Technical will be at its full student capacity.

5. At least seven community based programs will be in operation in the metropolitan area.

Available Slots Projected: City Board 1500

Special District 3150

YEAR 5—1985-86

IMPLEMENTATION:

1. Expected racial distribution for all schools within the range contemplated in paragraph 7.

2. Court will review progress in accordance with paragraph 16.

FOOTNOTES

1. Examples of Recruitment and Publicity Include:
   a. Set up and conduct a recruitment/orientation program in each sending school for ninth and tenth grade students and parents in the City and County.
   b. City Board and Special District counselor/recruiters are to be present at all programs to answer specific questions with regards to each schools course offerings and application procedures.
   c. A member of the Committee should be present at each program to answer students and parents questions with regard to transportation, discipline, class assignment, etc.
   d. Develop brochures and applications depicting all vocational offerings in the City Board and Special District.
   e. Send the brochure and application procedures to all 9th and 10th grade students currently enrolled in all public and private sending schools in the City Board and Special District.
   f. Set up open houses at all the vocational schools, City Board and Special District on different days, and notify by mail all 9th and 10th grade students of time and locations of activities.
   g. Develop a plan by which students may visit the technical schools while the schools are in session. This plan could also include that students in a particular vocational program may have extended time off from school and perhaps visit the shop for a few days or even a week (a welder in the City Board program would visit a weld shop in the Special District).
   h. Develop the following information material.
      a) slide presentation on City Board and Special District program offerings
      b) promotional films
      c) public service announcements
   i. An all out effort to get industrial support and endorsements from City and County manufacturers.
   j. Recruit local sports personalities, state legislators, etc. for promotional spots and personal appearances.
   k. Develop feature T.V. and radio programs featuring the voluntary plan and its positive aspect on the community.
   l. Incorporate the use of feature articles and continuing news items in the City and County papers.
   m. Establish an elementary career education program in all school districts to focus on vocational programming in the metropolitan area.

n. Set up counselor recruiting teams (1 City–1 County) to go to all the sending schools to recruit for the vocational programs.

o. Set up career information centers in all high schools and junior high schools in the City and County.

2. While application for these programs has been made by the Special District there is no reason why agreement cannot be reached between the City Board and the Special District for placement of these or other community based programs referred to in this Plan in the City.

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS
CLERK

No. 80-2152

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

CRATON LIDDELL, ET AL., and EARLINE CALDWELL, ET AL., and JANICE ADAMS, ET AL., and BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., and the CITY OF ST. LOUIS, MISSOURI, and, the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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No. 80-2152

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

CRATON LIDDELL, ET AL., and EARLINE CALDWELL, ET AL., and JANICE ADAMS, ET AL., and BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., and the CITY OF ST. LOUIS, MISSOURI, and, the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

The petitioners file this brief not only to reply to particular arguments advanced in opposing briefs filed by some of the respondents but also as a supplemental brief to advise the Court of events which have occurred since the filing of petitioners' petition.

On July 2, 1981, the district court ordered implementation of a plan for voluntary transfers of students among school districts of the St. Louis metropolitan area. See Appendix G. The State of Missouri was ordered to fund the provisions of this plan which included an increased total amount of state aid to the participating districts. Four of the 39 eligible districts elected to participate in this plan. (A fifth district later joined.) On August 24, 1981, the district court entered an order to implement the voluntary

plan with these four districts. The pending motions by the Caldwell plaintiffs as well as the City Board of Education to add these five districts as party defendants were stayed so long as they participated in good faith. See Appendix H.

Also on August 24, 1981, the district court entered an order to begin proceedings on a mandatory inter-district plan pursuant to paragraph 12(c) of the district court's May 21, 1980 order. See Appendix I. The court granted the Caldwell plaintiffs and the City Board of Education's motions to join the St. Louis County School Districts (with the exception of the five districts who have elected to participate in the voluntary plan) and stayed, pending an evidentiary hearing, the joinder of the school districts of St. Charles County and Jefferson County. The motion was also stayed with regard to the Missouri Housing Development Commission, the Housing Authority of the City of St. Louis, and the Land Clearance for Redevelopment Authority of St. Louis County, pending an evidentiary hearing. The Court, on its own motion, joined as party defendants three executives of the St. Louis County government. The Court ordered that the discovery be completed within 90 days, and that the state defendants, the United States, and the St. Louis Board of Education were ordered and directed:

> "To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County."

A hearing on these matters was ordered set for March 1, 1982.

A separate order directing the court-appointed experts to begin work on a mandatory, inter-district plan is included herein as Appendix J.

ARGUMENT

I

With regard to the voluntary plan filed pursuant to paragraph 12(a) of the district court's May 21, 1980 order, the City Board of Education argues that the petitioners are premature in seeking review. As is apparent from Appendices G and H, however, it is now obvious that this is not premature. The plan is being ordered into effect and the State of Missouri is being ordered to fund it. (The City Board has even requested that the State fund transfer students from non-participating districts.) The City Board suggests that the State of Missouri can appeal the July 2, 1981 order of the district court. The State of Missouri has done so, just as, out of an abundance of caution, it filed an appeal from the December 19, 1980 order of the district court which established for the first time that funding of the voluntary plan should be borne by the State even though there has been a finding of only an intra-district violation. See Appendix D. However, in its order denying the State's request for a stay, the Court of Appeals noted the existence of the district court's December 19, 1980 order and stated:

> "We deny the motion to stay our mandate or to stay enforcement of the district court's orders and adhere to our most recent pronouncement concerning the State's legal responsibilities for the prompt desegregation of the St. Louis public school system." Appendix B, page A-33.

Later the Court stated:

> "Moreover we are satisfied that the provisions of paragraph 12, both as originally written and as amended, must be enforced." Appendix B, page A-38.

Petitioners believe that there can be no doubt that their seeking review of paragraph 12(a) is not premature. We are no longer in a planning stage and the enforcement has met with the approval of the Court of Appeals. Contrary to the arguments in the opposing briefs, the application of *Hills v. Gautreaux*, 425 U.S. 284 (1976) to such a situation is novel and presents a significant question which this Court should consider.

Similarly, the provisions of paragraph 12(b) of the district court's May 21, 1980 order regarding vocational education of the St. Louis City School District and the Special School District of St. Louis County are being ordered into effect, again with the State being ultimately responsible for the funding. Again, whether this sort of mandatory inter-district relief ordered against the State, can be based upon a finding only of an intra-district violation, presents serious questions under *Hills v. Gautreaux, supra*, and *Milliken v. Bradley*, 418 U.S. 717 (1974).

In addition, the United States suggests that the State of Missouri has consented to the entry of this plan and is precluded from attacking the legal basis for entry of any order involving the special school district. Such an assertion is flatly incorrect and in need of clarification. The district court did not approve any consent decree and simply entered an order. The process for attempting to secure a consent decree had broken down. As far as the terms of the plan for joint vocational programs was concerned, the state defendants had no objection to what had been worked out by the City School Board and the Board for the Special School District of St. Louis County. Under Missouri law school districts within the state have long had the authority to negotiate agreements for joint projects. The process broke down, however, on the problem of funding this joint agreement. Normally, if two districts enter into such a contract, they are respon-

sible for its funding. In the instant case, the State of Missouri never consented to the imposition of any financial responsibility for the operation of the vocational plan. The district court's order, however, imposed such responsibility. The propriety of such an imposition of liability is clearly inappropriate in view of the fact that this had never been an inter-district desegregation case so the finding that the separate vocational systems were a vestige of a dual system was totally lacking in evidentiary support.

With regard to the mandatory inter-district desegregation plan contemplated by paragraph 12(c) of the district court's May 21, 1980 order, the assertion in the opposing briefs that this issue is not ripe or that it is moot is no longer correct, if indeed it ever was. The district court in its August 24, 1981 order has now revived the 12(c) proceedings and to that end has joined 17 separate school districts of St. Louis County as parties defendant. The state defendants, the United States, and the City Board of Education are ordered to submit a plan for inter-district desegregation by February 1, 1982, prior to the hearing which the court has scheduled on March 1, 1982. Petitioners find it incredible to require the submission of a plan prior to the finding of any violation. However, in its order the district court stated that in its most recent opinion the Court of Appeals had affirmed its power to order a mandatory inter-district remedy. Further, the district court has ordered the three court-appointed experts to file by September 7, 1981, an outline and timetable of an inter-district remedy for implementation in the 1982-83 school year.

In its opposing brief the United States stated:

> "In other words, this paragraph [12(c)] requires the St. Louis and State parties to undertake an investigation of their practices, report the results of that investigation, and propose corrective action to the

> Court. The order does not require any corrective action or mandatory participation of non-party school districts in desegregation."

Evidently the district court does not interpret paragraph 12(c) in the same manner as the United States. Petitioners believe that the district court's actions blatantly violate the principle of *Milliken I*.

II

At least two of the respondents question whether review by certiorari is possible in view of the fact that the State of Missouri had not sought certiorari from the 1980 opinion of the Court of Appeals. The petitioners believe that certiorari is clearly appropriate pursuant to this Court's opinion in *Mercer v. Theriot*, 377 U.S. 152 (1964), in which this Court stated that it could consider all substantial federal questions determined in earlier stages of the litigation. The City Board of Education acknowledges this case but seeks to distinguish it in a footnote by reference to *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399 (1923). However, in that case the Court referred to its earlier opinion in *Hamilton-Brown Shoe Company v. Wolf Bros. and Company*, 240 U.S. 251 (1916). In discussing *Hamilton*, the Court noted that it had involved the denial of certiorari for an interlocutory ruling of the Court of Appeals and that a second petition for a writ of certiorari was not barred. Respondents submit that a reversal and remand for purposes of devising a remedy is likewise interlocutory and that certiorari therefore lies to consider the propriety of the 1980 opinion of the Court of Appeals. See *Ashcroft v. Mattis*, 431 U.S. 171 (1977). It is interesting to note that when the State argued during the course of the second appeal that there had been no reversal of the district court's finding of non-liability regarding the State, the

Court of Appeals not only rejected that argument, but stated:

> "At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so." See Appendix A, pages A-22 in the initial petition for certiorari.

Under the circumstances, petitioners believe that clearly the 1980 opinion of the Court of Appeals was not such a final ruling as to preclude certiorari at this time.

With regard to the Court of Appeals' holding that the City Board of Education had not disestablished the dual school system in 1954, the City Board of Education suggests that this is essentially a fact oriented question which it is not necessary for this Court to review. However, the essential question which the petitioners seek to raise is whether the Court of Appeals has applied the appropriate standard and mode of analysis to this question. A review of the Court of Appeals' opinion will indicate that it did not really hold any of the individual factual findings of the district court to be erroneous. Rather, the Court of Appeals parted company with the district court only on the question of whether these facts indicated that the City Board of Education had disestablished the dual system. This, the petitioners believe is primarily a legal conclusion or, at least, a mixed question of fact and law.

The question becomes whether the Court of Appeals properly applied the correct standards in making this determination. Was the Court of Appeals' reliance upon 1962 statistics proper? Was it proper for the Court of Appeals to consider the evidence of demographic change only for remedy purposes? Did the Court of Appeals adequately address the issue of causation?

In *Goss v. Board of Education*, 371 U.S. 683 (1963), this Court stated:

> "Now, however, eight years after this decree [Brown II] was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered." *Id.* at 689.

The context in which this case comes before this Court, however, is not one in which a school board delayed for years in doing anything but one in which a school board adopted a plan 36 days after this Court's decision in *Brown I*; a plan which was not challenged for 18 years. This context has never been properly recognized by the Court of Appeals.

With regard to the issue of state liability, the United States on page 12 of its brief outlines constitutional and statutory provisions of the State Board of Education which imply that local school districts are not truly autonomous. The petitioners dispute this vehemently. The United States employs language appearing in Judge Meredith's original decision. But the comparison between his comments regarding the scope of the State Board's authority with that of the City Board's will indicate that local boards of education in Missouri are truly autonomous. *Liddell v. Board of Education, City of St. Louis*, 469 F.Supp. 1304, 1312-1314 (E.D. Mo., 1979). School districts in Missouri have virtually identical authority noted by this court in *Milliken v. Bradley*, 418 U.S. 717, 742, n.20 (1974). Further, the State of Missouri, unlike Michigan, does not control boundaries, supervise site selection or approve bonds. *Id.* at 758. See Appendix K.

It is argued the State of Missouri did nothing to "help, urge, or force the St. Louis School District to dismantle its dual system." The question which the petitioners posed

and which is still unanswered is upon what basis could the State of Missouri have determined that such action was necessary. As it was pointed out in the initial petition, case law extending throughout the 60's would have indicated that the plan adopted by the City Board of Education was constitutionally adequate. Indeed, a plan virtually identical to that of the City Board's (including the continuation transfer which the Caldwell plaintiffs equate with *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968)) was approved in *Goss v. Board of Education, City of Knoxville, Tennessee*, 340 F.Supp. 711 (1972), *aff'd*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 417 U.S. 1171 (1974). For the State of Missouri to have had a basis to have urged or forced the City School Board to take any further action, it would have to have anticipated the course of judicial opinions 20 years in the future. This appears to be a case in which the failure to anticipate the change in the law constitutes an independent constitutional violation. *Columbus Board of Education v. Penick*, 443 U.S. 449, 501 (1979) (Justice Rehnquist dissenting).

In a related issue, the petitioners assert that even assuming a proper finding of state liability, the district court and the Court of Appeals erred in imposing a blanket assessment against the State of Missouri for one-half of the cost plan. The United States responds that costly remedial action was required of the State of Texas. However, a review of the opinion will indicate that the order directed against the State of Texas was nowise similar to that entered against the State of Missouri. *United States v. Texas*, 447 F.2d 441, 446-448 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). The point which the petitioners seek to make is simply that the appropriate course of action for a district court is simply to order whatever action the Court determines is required to correct a violation. The petitioners submit that it is patently improper (particularly when the defendants are governmental entities) for a court to put its stamp of approval on any par-

ticular dollar amount to achieve these ends or to require the funds to come from any particular public source. To do so is an unwarranted interference with one of the most basic functions of any governmental unit, its budgetary process. If a district court orders a corporation to cease and desist certain polluting activity and orders it to clear up the effects of its pollution, the district court does not establish a budget and tell the corporation where to get the money. Such concerns are generally left to the corporation which must comply with the court order and petitioners believe such matters are best left to the State of Missouri and the City School Board in making their own budgetary determinations. For instance, the Missouri State Penitentiary is currently under court order and yet the district court has not set a dollar amount which must be spent or ordered a source for any funds.

CONCLUSION

The petitioners, therefore, submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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SUPPLEMENTAL APPENDICES

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

PART ONE—INTRODUCTION AND ORDER

ORDER

This order deals with the voluntary desegregation of the public schools in the St. Louis metropolitan area.

This school desegregation class action case was initiated some nine years ago, on February 18, 1972. The detailed, lengthy histories of this cause are set forth in numerous opinions and there is no need to reiterate them here. *See Liddell v. Bd. of Ed. City of St. Louis, etc.*, 469 F.Supp. 1304 (E.D. Mo. 1979); *Liddell v. Bd. of Ed. of City of St Louis, Mo.*, 491 F.Supp. 351 (E.D. Mo. 1980); and the opinions of the Court of Appeals. *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Adams v. United States*, 620 F.2d 1277, 1281-84 (8th Cir. 1980); and *Liddell v. Board of Education of the City of St. Louis*, No. 80-1458 (8th Cir., Feb. 13, 1981).

This Court has jurisdiction of the subject matter of this class action, has jurisdiction over all the parties,

and hereby enters this judgment and decree pursuant to its equitable powers.

This order is made pursuant to paragraph 12a of Judge Meredith's order herein of May 21, 1980, as amended, which provides:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by . . . .
>
> The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.
>
> One of the subjects to be considered for voluntary cooperation between the City and the

suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants and the St. Louis Board of Education on . . . .

Pursuant to [this] paragraph . . . the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or before . . . . The Plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on . . . as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report . . . shall include the number of students that each district is willing to receive and

those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

Paragraph 12a in its original form was approved by the Eighth Circuit in its opinion of February 3, 1981:

> Section (a) of paragraph 12 directs the parties to "make every feasible effort" to work out a voluntary plan of inter-district pupil exchanges to be implemented in the 1980-1981 school year. Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up. Under the terms of the order, the plan is to be designed to "assist in alleviating the school segregation in the City of St. Louis [and to ensure] that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353. Thus, the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City. *Liddell v. Board of Education of the City of St. Louis,* No. 80-1458 (8th Cir., Feb. 13, 1981), slip op. at 19.

After some continuances, this Court, on March 4, 1981, ordered the State defendants, in cooperation with the Board of Education of the City of St. Louis and the United States, to file a 12(a) plan or plans within sixty days. An interim progress report was to be filed by the above parties within thirty days. Edward T. Foote, Chairman of the Desegregation Monitoring and Advisory Committee, was also requested to propose and file a plan for voluntary inter-district desegregation by March 27, 1981.

On March 27, 1981, the Chairman of the Desegration Monitoring and Advisory Committee, Dean Edward T.

Foote, submitted an educational plan for voluntary inter-district desegregation. On May 4, 1981, the State defendants filed a plan for "voluntary transfer of students in the St. Louis Metropolitan area." On May 4, 1981, the United States and the Board of Education of the City of St. Louis also filed a joint plan pursuant to this Court's order of March 4, 1981. Both the State's voluntary plan and the U.S./City Board plan drew heavily from the Foote plan. The matters contained therein are identical or substantially similar to the Foote plan in many respects. There are many areas of agreement among the three plans as well as some differences. The State and U.S./City Board plans often flesh out the Foote plan and contain more specific criteria than proposed in the Foote plan, probably as a consequence of having additional time to prepare and file their plans.

At the request of the Court, on June 18, 1981, the court-appointed expert, Dr. Gary A. Orfield, also filed an educational plan for voluntary, cooperative desegregation of the schools in the St. Louis metropolitan area. This plan also draws substantially from the Foote plan.

The intervening plaintiffs, Adams, although not ordered to do so, submitted a proposal for metropolitan desegregation on April 27, 1981. It deals with 12(a), 12(b), and 12(c) plans. It suggests that a regional school district embracing St. Louis, St. Charles and Jefferson Counties and the City of St. Louis be established which would include several local school units. The regional school district and local school units would be governed by elected boards which would have power to deal with education in the metropolitan area.

A substantial problem in effectuating a desegregation remedy is providing for its costs. The Adams proposal was the only one which submitted that a regional school district would be responsible for levying a uniform, equalized

tax for education throughout the area and distributing such tax money to the boards of local school units. The proposal is based on the proposal of the Missouri School District Reorganization Commission issued in November of 1968.

After reviewing the similarities and differences among the various plans for voluntary desegregation and considering the record as a whole, the Court in issuing this order and in adopting the plan embodied herein seeks to draw from the best aspects of each of the proposed plans.

The Court held an evidentiary hearing on May 21, 26, 27, and 28, 1981, at which all parties were afforded an opportunity to call, examine, and cross-examine witnesses and to offer exhibits and such other evidence they deemed appropriate.

Dr. Robert Bartman, Administrative Assistant to the State's Commissioner of Education, testified on behalf of the State; Superintendent Robert Wentz and Dr. Gordon Foster testified on behalf of the City Board; Dr. David Bennett, Deputy Superintendent of Milwaukee Public Schools, testified on behalf of the Caldwell plaintiffs; and Dr. Gary Orfield, the court expert, as well as Dean Edward T. Foote, also testified.

All of the witnesses testified in agreement with the conclusion that this Court and the Court of Appeals had expressed: that a voluntary inter-district desegregation plan would be helpful in desegregating the remaining segregated schools in the City's school system.

Dr. Foster and Mr. Bennett described the results of similar voluntary plans in Milwaukee, Hartford, Rochester, and Boston. Those plans contained incentives for participating school districts similar to those in the proposed 12a plans, although in some cases at a much higher level

of state contribution. None of the plans contained a tuition incentive for students similar to that proposed in the U.S./ City Board plan. The average level of participation in the plans was from 1000 to 1500 students going from the city to the suburbs, and from 150 to 200 students from the suburbs to the city.

Dr. Orfield considered the tuition incentive proposal to be an "exciting" idea and suggested implementation on a limited basis to determine its potential effect.

Mr. Bartman, on behalf of the State, testified that the State Board supported fiscal incentives for school districts but in no specific amount.

Dr. Orfield proposed that an expert be retained to design a pilot, or experimental, program to test this tuition proposal before the Court decides whether to order it implemented generally. The City Board supported Dr. Orfield's recommendation in this regard.

In addition, Dr. Orfield suggested that it may be too close to the start of the 1981-82 school year for the City Board to be successful in establishing new magnet schools which would open in September of 1981. Dr. Orfield urged that the City Board should focus on using and expanding its existing magnet schools.

Dr. Foster testified that the U.S./City Board plan promises to achieve a greater amount of actual desegregation than the State plan and is in many important respects far more specific and detailed than the State plan.

Dean Foote, who is highly regarded by all the parties, testified as to his activity in developing his plan as ordered by the Court. He testified he met with many individuals representing different interests and found there was much concensus among the various parties and sub-

urban districts. He indicated that the basic concept of the plan was voluntarism and would have a "good chance" of success. He testified as to the plan he submitted to the Court and the various components of his plan. He was cross-examined by several of the parties.

After consideration of the various 12a plans submitted to the Court; the evidence and argument submitted to this Court at the hearings held in May, 1981; the briefs and memoranda filed by the parties; the entire record in this litigation to date; and the Court having concluded that the implementation of a voluntary plan can assist in effectuating compliance with the mandate of the Eighth Circuit Court of Appeals, the Court adopts and approves the following plan to alleviate desegregation in St. Louis. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following plan be implemented beginning with the start of the school year 1981-1982.

PART TWO—THE PLAN

I. *General Characteristics*

These general characteristics apply to all of the following elements of the plan:

A. The plan is voluntary in philosophy and fact. This point is central to this plan and distinguishes it from other alternatives. The word "voluntary" as used throughout should be understood in its usually accepted sense, specifically:

No students would be required to attend any schools but those to which they would normally be assigned. The plan presents additional options and incentives for students, parents, and school districts. Every decision concerning

the choice of schools and districts other than students' home schools and districts would be made by students and their parents.

Participation in this plan is neither an admission of liability nor an element of proof of liability of any suburban school district in an inter-district school desegregation case.

A school district's participation in this plan would be voluntary. Each school district in the St. Louis metropolitan area is encouraged to make its own independent decision whether to participate in the plan.

B. This plan is designed to lead to an educationally sound and relatively expeditious means of promoting racial desegregation of the public schools throughout the metropolitan area, provided that a sufficient number of school districts in the metropolitan area agree to participate and the plan proves effective.

C. Voluntary acceptance of this plan by a participating district constitutes formal commitment toward furthering desegregation. All districts are encouraged to adopt any additional education or other programs that would reasonably further desegregation, whether or not they were part of this plan. By participating in the plan, each district acknowledges a responsibility not to engage in any purposeful and intentional segregative activities. Each participating district shall adopt procedures to ensure that transfers are prohibited if they would increase segregation.

D. The plan has three broad segments:

1. Permissive, inter-district transfers to existing programs that already have available space (or where space may be made available) when the transfer would decrease racial segregation;

2. Specialized "magnet" schools and "magnet" programs that could be either full-time or part-time;

3. Educational programs designed to increase and promote constructive experiences for students of different races, but not necessarily in traditional "academic" settings or within or by virtue of association with schools.

II. *Definitions*

For purposes of this order, the following terms are defined below:

"Home District" means the participating district which is the district of residence of the student transferring to another district pursuant to this plan.

"Host District" is the participating district which receives a student who transfers from another district pursuant to this plan.

"Magnet Program" means a specialized educational offering in an existing school or elsewhere that students would choose for part of their educational experience while retaining primary affiliation with their "home" schools.

"Magnet School" means a school offering a specialized program of instruction to students assigned there on a full-time basis.

"Metropolitan Area" includes the City of St. Louis, St. Louis County, St. Charles County, and Jefferson County.

"Participating Districts" means those districts that voluntarily decide to participate in the plan.

"Part-Time Integrated Programs" are educational activities in which students from two or more schools cooperatively engage, usually at an educational, cultural, or governmental institution other than the participating schools. At least one of the paired schools must not have a majority black enrollment.

"Plan Ratio" means a racial ratio of students in the schools of the participating district of seventy-five percent white—twenty-five percent black. The evidence and pleadings represent that the racial ratio in the St. Louis metropolitan area is seventy to eighty percent white. The Racial Ratio of this plan reflects both the long-range central objective of the plan and the necessity of certain realistic limitations on effort to achieve the Racial Ratio.

"Regular Programs" are non-magnet school programs. In the St. Louis public schools, regular school programs are generally organized in the following grade configurations: Kg.-5, Kg. 6-8 and 9-12.

"Space Available" is the number of individual spaces for students within a school district not being filled by resident students of the district. Space available in a district is based upon building capacity and resident student enrollment. In initially determining what space is available in their district, participating districts shall consider the following:

Currently unused but suitable space (e.g., closed buildings) may be considered as potential available space in determining the number of transfer students a participating district can accept.

Students who choose to participate in magnet schools and programs will open up space in their home districts. An estimate of the number of students in each district who will enroll in magnet schools shall be made by participating district and an appropriate adjustment made in its estimate of the space available in its district.

The formula for computing spaces available on an individual school basis shall be: total number of classrooms in building available for regular grade in-

struction minus classrooms used for special purposes times pupil teacher ratio minus anticipated enrollment equals space available.

School districts receiving transfer students will be reimbursed for expenses of all transferring students and, thus, aided in hiring additional staff as necessary to accommodate transferring students.

"Students" includes pre-school, elementary, and secondary students throughout the St. Louis metropolitan area.

III. *Permissive, Inter-District Transfers to Existing Programs*

A. Students who are members of the racial majority of the student population at a school in any participating district have the right to transfer voluntarily to a school and district in any other participating district in which they would be in the racial minority on certain conditions. The following provisions shall govern the operation of permissive inter-district transfers:

1. A student whose race is in the majority in the home district is eligible and has a right to transfer to a host district and school where the student's race is in the minority only when space is available in the host district and host school.

2. Each participating district shall list the number and grade level of transfer students it can currently accommodate without opening additional schools or hiring staff at the time it accepts this plan.

3. The host district will determine the space available in the host district and host school pursuant to the definition of space available set forth herein so that no student in the host district will be displaced by a permissive inter-district transfer student.

4. The host district shall provide the same educational and related services to the permissive transfer student as are provided its own students. The commitment to accept the student shall be for the duration of the student's voluntary participation in the plan.

5. Participating districts shall provide information to the Coordinating Committee (*see infra*) on space available by school and by grade. Information shall also be provided for dissemination that will include mention of the special characteristics of each school with available space, including program strengths, enrollment, racial composition, extracurricular activities, parent organization, location, and any other information that would reasonably be expected to assist parents and students in making an informed choice.

6. An eligible student may apply for a specific school in a host district in which available space has been identified. A student may list several choices of schools in the order of preference to allow for the possibility that space in the school of first choice is filled prior to the processing of the application. The host district shall accommodate these student preferences to the extent possible.

7. Participating districts shall actively promote the permissive inter-district transfer program through positive discussions and presentations to their students, through the distribution of written information about the choices available, and by other appropriate means.

8. Permissive interdistrict transfer applications shall be approved for eligible students by the Recruitment and Counseling Centers (*see infra*) under the supervision of the Coordinating Committee on a first-come, first-served basis, subject to the following priorities:

a. Black students who live in the City of St. Louis and white students who live in majority white county districts.

b. Any eligible black student attending a school with an enrollment that is ninety percent or more of the student's race.

c. All other eligible applicants.

9. After the first year of the operation of the plan, students must exercise their right to transfer before March 1 of each year to be eligible for priority consideration. After that date each year, they would be treated like any other student from another participating district on a first-come, first-served basis. Once a student exercises his or her right to participate in the plan, the student will continue in said plan until the student affirmatively withdraws from participation as herein set out.

10. The host district shall honor the grade placement for the student as certified by the home district.

11. A permissive transfer student may elect to return to the home district by giving notice to the host district in compliance with this plan, i.e., by March 1 of the preceding year, without penalty to a host district that had fully complied with this plan.

12. The host district shall acknowledge the acceptance and enrollment of a permissive inter-district transfer student. The acknowledgment of acceptance shall include a written notification of acceptance to the student and/or parent as practicable, the home district, and the Director of the Recruitment and Counseling Centers. Should the transfer be terminated, a written acknowledgment shall be provided the student and/or parent as practicable, the home district, and the Director of the Recruitment and Counseling Centers.

Participating districts shall also exchange student transcript information as needed.

13. All applications for permissive transfers shall be processed by the Recruitment and Counseling Centers. The Centers shall keep up-to-date records on space available in participating districts and on all permissive inter-district transfer students and the status of such transfers.

14. Any students transferring inter-district for any program shall meet the same criteria for admission and responsibilities that apply to students of the host district.

15. Once admitted, permissive inter-district transfer students will be expected to meet the same general standards, academic and other, as applied to students of the host district. Once admitted, permissive inter-district transfer students shall be eligible to participate in all school programs (academic, athletic, extracurricular and other) and shall not suffer any disability or ineligibility because they are permissive inter-district transfer students.

16. Participating districts shall apply disciplinary standards and procedures in a nondiscriminatory manner. Each participating district shall develop procedures to ensure that permissive inter-district transfer students are not resegregated through educationally unjustified assignments.

17. Students who have demonstrated disruptive behavior in their home district may be prohibited from participating in the permissive inter-district transfers. All participating districts shall notify others and provide any available, substantial evidence of disruptive behavior of a student proposing a permissive inter-district transfer to another participating district. Prior to any student's transfer, the home district shall issue a statement that the transferring student has not demonstrated disruptive behavior.

B. Subject to space available, each participating district with a student population that is majority white shall

accept up to as many black permissive inter-district transfer students as would constitute fifteen percent of the total student population in that district, except that no participating district shall be required to accept more black permissive inter-district transfer students than would raise the overall percentage of blacks in the total student population higher than twenty-five percent. Subject to space available, a participating district that is majority black would similarly accept white transfers up to the "Plan Ratio." Nothing in this section shall be construed to prohibit any participating district from exceeding the plan ratio if in doing so it furthers racial desegregation.

C. Without regard to space available or the plan ratio, and so that all participating districts have the opportunity to participate in student transfers, each participating district with an enrollment of 8,000 students or less shall make available each year at least fifty spaces, and each participating district with an enrollment of over 8,000 students shall make available at least 100 spaces. In each succeeding year, such participating districts at a minimum shall agree to make available for transfers under this plan additional spaces equivalent to an additional one percent per year of its current resident enrollment until the district's enrollment reaches the plan ratio. Any participating district which does not receive sufficient transfers to fill these minimum spaces shall actively recruit students to fill those spaces.

D. Once students exercise their right to participate in the plan, they will continue in said plan until they affirmatively withdraw from participating by notifying the host district on or before March 1 of any school year for withdrawal from the succeeding school year.

E. Students who have elected to transfer under this plan shall remain students of the host district until they

choose to return to the district where they reside. These students will not have to transfer each year or exercise a transfer choice to remain in the host district.

F. The City Board shall affirmatively recruit white students under this plan, and other participating districts shall cooperate in this effort.

G. If more permissive interdistrict transfer students apply to attend school in a participating district than there are spaces available, these students may list additional choices of host districts in order of preference, and they shall be placed in another host district of their choice if possible.

IV. *Magnet Schools and Magnet Programs*

Magnet schools and magnet programs are a very important part of a voluntary plan for desegregation. Magnet schools and programs offer specialized educational programs which cannot be offered in a school that does not draw students from a large area. Magnet schools and programs have been a very successful element in the City's desegregation plan. Therefore, provided a sufficient number of participating districts agree to accept this plan as determined by this Court:

A. The number of magnet schools in the metropolitan area shall be increased as follows:

1. Two new magnet schools shall be created in the City of St. Louis, patterned after "Individually Guided Education" at Woerner (1-8) and the "Academy of Basic Instruction with the Mastery Learning Approach" at Lyon (Kg.-8) (kindergarten will be all day and magnet). These two new magnet schools will begin operation at the start of the 1981-82 school year if the City Board determines this to be feasible. If it is not feasible, then these two

new magnet schools shall open in time for second semester of the 1981-82 school year.

2. Two existing magnet schools shall be expanded. Stix Investigative Learning Center shall become a 5-8 (Kg. for neighborhood) center, while a 1-4 Investigative Learning Center shall be established at Mason School. The Visual and Performing Arts Center at Shaw School shall become a 5-8 (Kg. for neighborhood) center and a 1-4 Visual and Performing Arts Center shall be set up at Gardenville School. These expanded magnet schools will begin operation in the 1981-82 school year if the City Board determines this to be feasible. If it is not feasible, then they shall be expanded in time for the second semester of the 1981-82 school year.

3. The participating districts, working through the Coordinating Committee, may develop such other magnet schools and programs as they believe are educationally justified and will facilitate the goals of this plan. Such magnet schools and programs shall not duplicate under-subscribed magnet schools or programs offered in the City of St. Louis.

B. Subject to the basic principle of fifty percent white to fifty percent nonwhite racial enrollment in the magnet schools:

1. Students from suburban school districts who apply for admission to existing magnet schools in the City of St. Louis shall be admitted on a first priority basis, if their transfer from the district of origin does not increase racial isolation in that district or in the magnet school.

2. Existing magnet schools to be expanded shall admit students according to the following policy:

a. The present enrollment of the school will be given first preference.

b. Second preference will be given a member of the race which is a minority at the magnet school in question.

3. New magnet schools created pursuant to this plan shall admit students according to the following policy:

a. Priority consideration will be given to black city students and white county students.

b. Second preference will be given to white city students and black county students.

C. All applicants to magnet schools or magnet programs shall make formal application to one of the Recruitment and Counseling Centers for processing. Working cooperatively, the centers will send to individual students one of the following: notices of acceptance and assignment; notices of acceptance and placement on waiting lists; and notices of rejection. A time line will be developed by the Coordinating Committee providing cut-off dates for each priority of students.

V. *Part-Time Educational Programs*

A. *Part-time Ancillary Programs.* Many of the part-time ancillary programs are presently in operation in the St. Louis public schools and shall be expanded to include participating districts.

Among those programs presently in operation which shall be expanded are the following:

Pairing and Sharing
The Law and Education Project
Springboard to Learning
Career Education
The School Partnership Program
Ethnic Heritage
Radio Station KSLH

Another program which shall be expanded for the benefit of both city and county students is the English as a Second Language (ESL) program. This program is presently operational in three schools that have been designated as ESL Centers. Students must be enrolled in the school and show need of ESL services before they can participate.

Additionally, cultural/educational institutions with long-standing and enviable records for their educational programs for school children as well as the adult community have made commitments to participate cooperatively in programs specifically designed to bring together students from city and county schools. They have well-trained staffs and well-equipped facilities for extending learning experiences beyond conventional classrooms to the broader environment of the community and the world at large. The institutions involved are:

KETC-TV
McDonnell Planetarium
Missouri Botanical Garden
Missouri Historical Society
Museum of Science and Natural History
Saint Louis Art Museum
Saint Louis Symphony
Saint Louis Zoo
United Nations Association
Urban League Library

The voluntary integration program to be offered by these institutions will be a cooperative effort between each institution and the participating schools. As a first step, the institutions will establish certain general guidelines for their respective programs and extend the opportunity for participation to schools in the city and county. Faculty

members and administrators will recommend students for participation in the programs.

While the format and scope of the programs will vary from institution to institution, each will have a common denominator: To bring together racially mixed groups of students from the metropolitan area districts periodically for programs of unique educational value.

Additionally, it is envisioned that cable television could become an integral part of the metropolitan voluntary plan.

B. *Part-Time Specialty Programs.* Students enrolled in part-time specialty programs shall attend classes a half-day for a complete semester or a full year. These programs include:

Honors Art
Honors Music
Public Safety
Transportation
Mass Media

A student may participate by enrolling in that high school or by spending one-half day in his/her home school and the other half in the high school of the specialty. Honors Art and Honors Music shall be in a school setting which houses only these programs. For these last two programs, students must spend one-half day in their home school and the other half day in Honors Art or Honors Music Programs. Public safety classes will be held at the Police Academy or Fire Academy. All specialty programs are at the secondary level.

C. *Policies and Procedures*

1. Pupils must apply for admission into part-time specialty programs and will be admitted on a first-come,

first-served basis with consideration being given to racial balance.

2. Part-time ancillary program experiences will be cooperatively planned and implemented by staff at the participating schools and institutional staff where appropriate with due consideration being given to racial balance.

VI. *Staff Exchanges*

A. *Description*

The success of a metropolitan desegregation plan will be facilitated by the provision of personnel with understanding and sensitivity for the concerns and needs of students and parents involved in new experiences at unfamiliar sites. Staff exchanges allow for meeting this need by making available in host districts professional personnel from the home districts.

Staff personnel in various capacities may agree to work in a district other than their home district for a specified period. During that time, they would report to and operate under all rules and regulations of the district in which they are working.

Basic assumptions for staff exchanges follow:

1. That the district from which a staff member comes shall continue to pay that person on the salary scale for that district.

2. That teachers and administrators will have an opportunity to confer prior to the assignment.

3. That all arrangements as to the number of staff that would transfer and the duration of such transfer shall be reached cooperatively between the home district, host district, and the teacher or administrator involved.

4. That opportunity for flexibility shall be built into these arrangements with consideration toward achieving racial balance.

B. *Policies and Procedures*

Staff exchanges involve a staff member from one district volunteering to work in another district in the same capacity he or she is presently serving, unless otherwise agreed upon.

The following guidelines, consistent with the purposes of this plan and subject to whatever revisions are mutually determined as necessary by participating districts, will be followed in implementing staff exchanges.

1. A staff member of satisfactory or above rating may volunteer to participate in the staff exchange program.

2. Short term one-to-one staff exchanges may occur as follows:

a. Principal of school A in the city or county will serve in school B in the city or county for a month, two months or whatever the agreed upon time.

b. Other staff of school A in the city or county will serve in school B in the city or county for a month, two months or the agreed upon period of time.

c. Long-term voluntary exchanges would involve a staff member declaring willingness to serve in a district other than the one to which presently assigned for a semester, a year or an indefinite period of time.

d. Guidelines by the Coordinating Committee would be established for staff exchanges to assure compliance with Court orders.

e. No district would displace present personnel to accept personnel from another district.

f. Teachers who participate in staff exchanges would attend workshops/seminars which would help prepare them for their new assignments.

VII. *Parent and Community Involvement*

A. *Description*

One of the current thrusts in education nationwide is the concept of parent involvement in schools. At many local levels throughout the United States, boards of education have organized and implemented departments which function in this particular capacity. The focus of such programs is to improve the quality of education for children.

Parental involvement program centers shall be established in strategic places throughout the entire metropolitan area. Parents will be provided a comfortable setting in which to learn about the developmental stages of children, how to develop positive self-concepts in their children, how to provide meaningful assistance with school work and through participation in field experiences, and how to provide meaningful trips to places of interest for their children.

Activities such as slide presentations, seminars and group discussions will be utilized in assisting parents to gain knowledge and skills in helping their children. Topics would include programs from The Master Package for Bowdoin Method, i.e.:

Parents and Teachers
Vocabulary Building
How Your Child Learns
Words That Win Children
Instead of Nagging
The Importance of Good Feelings
How Things Look
Getting Ready for Reading
Help Your Child Read Better

Parent and community organizations in conjunction with respective school staff would work cooperatively to open and keep open the lines of communication between school, home and community.

B. *Policies and Procedures*

The Coordinating Committee shall submit recommendations for the parental involvement program centers, including:

- identifying public information liaison persons to be assigned where needed.

- suggesting parental involvement specialists to be assigned where needed to serve as technical assistants to school principals, parents and community groups; and

- providing training in developing communication, leadership and parenting skills.

VIII. *Transportation*

A. The Missouri State Department of Elementary and Secondary Education shall provide the expertise to resolve the details of routes, distances, and kinds of appropriate transportation as the specifics of the plan to be adopted are determined.

B. The transportation plan finally approved by the State Department of Elementary and Secondary Education shall include the following:

1. Transportation will be provided for inter-district permissive transfer students enrolled in regular or magnet programs who reside more than one mile from the school site.

2. Transportation will be provided for students enrolled/participating in part-time ancillary programs and half-time specialty programs.

3. Board owned and operated buses of participating districts will be used to transport students where possible, and contracted bus service will be utilized where necessary.

4. Students will be provided with bus passes where feasible.

C. The State Department of Elementary and Secondary Education shall be responsible for negotiating transportation contracts for the purpose of transferring students participating in the plan. All transportation contracts and routes established pursuant to this plan shall be approved by the State Department of Elementary and Secondary Education.

IX. *Administrative Coordination*

A. *Coordinating Committee*

1. A "Coordinating Committee" shall be established to supervise and manage this plan and shall be organized and constituted within forty-five days of the date of this order. It shall exist as long as this plan exists.

The Coordinating Committee shall include one professional administrator selected by each participating school board, one city teacher selected by the American Federation of Teachers, and one suburban teacher selected by the Missouri Education Association, as well as one city parent selected by and serving on the Court's monitoring committee and one suburban parent serving on the Council of the Cooperating School Districts of St. Louis County. The Coordinating Committee shall include a representative of the State Department of Elementary and Secondary Education, selected by the Commissioner of Education.

Each person shall be appointed for a term of one year. If the appointing authority fails or refuses to make an appointment, the Court shall select a representative. If

a vacancy occurs, the appointing authority shall make a new appointment; if the authority fails to do so, the Court shall select a representative.

Each participating district shall name its representative to the Coordinating Committee within ten days after it accepts the voluntary desegregation plan. All other authorities entitled to designate a representative on the Coordinating Committee shall submit the name of their nominee within forty-five days of the date of this order.

2. The purpose of the Coordinating Committee is to coordinate, to oversee generally, and to plan for and make recommendations concerning the plan. The Committee shall adopt such by-laws, rules and operating procedures not inconsistent with this plan or court orders as it may deem necessary and shall submit the same for approval by the Court. The Committee shall file an initial staff budget, organization, and membership report to the Court no later than September 15, 1981.

3. The Coordinating Committee shall have a full-time staff of sufficient size to ensure the efficient implementation and operation of the plan. A director shall be named to head this staff.

The Court believes that the success or failure of the plan will depend in large measure on the actions taken by the parties within the next thirty days. To the end that these activities may be most effectively coordinated, the Court designates Susan Uchitelle, the Missouri Supervisor of Instruction for Area A, as interim director.

4. The Coordinating Committee and its staff shall, in cooperation with the participating districts, be responsible for developing policies and procedures to implement and operate all aspects of the plan. In particular, it shall be responsible for developing policies and procedures for:

a. Part-time educational programs;

b. Staff exchanges;

c. The parent and community involvement programs.

These policies and procdures shall be developed in a manner consistent with the principles set forth in the plan. They shall be developed and submitted to the Court for approval as soon as practicable, but not later than December 31, 1981.

5. The Coordinating Committee and its staff shall assist participating districts in the functions listed below:

a. Planning and implementing new magnet school programs.

b. Developing policies and procedures related to the plan.

c. Supervising recruitment and counseling in student exchanges.

d. Coordinating dissemination of information on programs to the community.

e. Assisting in identifying possible sites, building capacities and spaces available.

f. Assisting in developing and implementing an effective system for transporting students.

g. Coordinating services in the area of safety and security.

h. Coordinating staff development activities in order to prepare staff to function in integrated settings.

i. Developing guidelines for staff exchanges to assure compliance with Court orders.

j. Preparing annual budgets for submission to this Court.

k. Coordinating other administrative activities as needs become apparent.

6. Should it be determined by the Coordinating Committee that special centralized management and instructional support services are needed to implement the plan (e.g., food service, data processing, purchasing, staff development, audio-visual services) such services may be authorized by the Coordinating Committee. All participating districts shall be eligible to share in these centralized services.

7. The Coordinating Committee shall report every six months to the Court on the current status of all activities going forward under the auspices of the plan with the first report due January 1, 1982.

B. *Recruitment and Counseling Centers*

1. The existing Recruitment and Counseling Center in the City of St. Louis shall continue to function as per the St. Louis public schools desegregation plan. A new Recruitment and Counseling Center for this voluntary plan shall be established in a central location in St. Louis County. This Center shall have a full-time staff of sufficient size to ensure the efficient implementation and operation of the plan and shall report to the Court within six months of its establishment regarding its personnel, policies, and activities actually conducted.

2. The Recruitment and Counseling Centers, with their staffs increased by representatives from participating districts and under the supervision of the Coordinating Committee, shall process all applications for permissive transfers, conduct recruitment drives in the participating

districts, conduct related advertising campaigns, and coordinate the development and dissemination of information about the choices available to students.

The Recruitment and Counseling Centers shall keep up-to-date records of all permissive inter-district transfer students and the status of such transfers.

3. These centers shall be coordinated by a Director of Recruitment and Counseling Centers under the supervision of the Coordinating Committee. The city summer satellites will continue to be located in the southeast, southwest, northeast and northwest sections of the city. Additional satellite stations may be established in St. Louis, Jefferson, and St. Charles Counties as the need may arise upon application to the Court.

Any student involved in this plan, either in a part-time specialty program or in a full-time program, will be processed through the Recruitment and Counseling Centers. Students involved in part-time ancillary programs will not be processed by the Centers. The costs of these centers and any necessary support staff shall be included in the budget of the Coordinating Committee and shall be funded by the State of Missouri.

X. *Finances*

A. During the first year's operation of this plan, for each student who voluntarily transfers from his or her district to a host district, the home district will receive one-half of the state aid it would have received had the student remained in his or her home school. Each host district shall report its average cost of educating a student to the Coordinating Council. The State shall reimburse the host district for the first $1,250 of the average cost for each transfer student, and shall reimburse fifty percent of the additional average cost over $1,250. The

State shall calculate how much money would have been paid in state aid to the home districts from State foundation funds had the transfer students remained in their home districts. That sum shall be applied to the costs of this plan and shall continue to be charged to the foundation funds. Additional costs required by this plan, however, shall not be funded from foundation funds. Students who are accepted in a host district shall not be required to pay any fee to the host district as an out-of-the-district student.

After operation of the 1981-82 school year, the Court shall review the matter and enter the appropriate orders as to these costs.

B. All other costs or expenses of this plan for the first year shall be borne by the State of Missouri. This includes the start-up costs and building modification costs of new magnet schools and expanded magnet programs; parent and community involvement centers and part-time educational programs; transportation of transferring students; and the operating expenses of the Coordinating Committee, its staff, and the expanded Recruitment and Counseling Centers. If the City Board, the State, or other participating districts obtain ESAA Out-of-Cycle Assistance Grants, or other funds, the amount of such funding shall be deducted from the State's funding requirement for the plan.

C. No later than March 1, 1982, the Coordinating Committee shall, and the State of Missouri or any other party participating in the voluntary plan may, submit a budget to the Court to fund this plan for the ensuing year.

XI. *Participation in Plan*

A. The State Department of Elementary and Secondary Education of Missouri shall, within five days of the

entry of this order, distribute it to the superintendents of all school districts in the metropolitan area. All school districts located in the metropolitan area shall have until August 6, 1981, to advise the Clerk of this Court of their intention to become participating districts for the school year 1981-82 and their acceptance of all of the terms and conditions of this order. Thereafter, when non-participating school districts wish to join this plan, they shall advise the Court, on or before January 31, of their intention to become a participating district for the ensuing year.

At the time of accepting the plan, each participating district shall submit space available and information required for dissemination to the Coordinating Committee. Within ten days after acceptance, each participating district shall name its representative to the Coordinating Committee.

B. Any participating district shall have the right to withdraw from the plan for the ensuing school year, if it notifies the Court and the Coordinating Committee prior to March 1 of its intention to do so. Voluntary inter-district transfer students currently attending a participating district which elects to withdraw from the plan shall have the right to remain in their host school and the withdrawing home district shall continue to receive state aid as per this order until such time as the students graduate or leave the district, unless the Court upon good cause shown directs otherwise. Voluntary inter-district transfer students in such circumstances shall continue to enjoy all the rights and protections afforded by this plan.

C. The plan submitted by the United States/City Board contains a provision that each permissive transfer student would receive one year free education in a Missouri institution of higher education for every two years of voluntary permissive transfer. Before adopting this novel approach, the Court directs the parties to make rec-

ommendations concerning potentials and limitations of this concept and suggestions as to how it may be used on an experimental basis. The parties shall also compare the costs of a tuition-credit concept with other educational programs employed to reduce segregation. The parties are encouraged to seek the aid of educational experts. The Court may also receive suggestions from the Center for Social Organization of Schools at Johns Hopkins University and its own experts.

D. The Court may thereafter consider the possible approval of the implementation of a model tuition-credit program.

XII. *General Provisions*

A. All participating districts are required not to engage in any purposeful segregative activities and shall adopt procedures to ensure that transfers shall be prohibited if they would increase segregation.

B. Participation in this plan by any school district shall not be deemed an admission of liability nor an element of proof of liability in any inter-district school desegregation case.

C. All previous orders of this Court not inconsistent herewith remain in full force and effect.

D. Given the broad geographic dimensions of the plan, practicalities of participation by individual districts may require slight variations in the plan. The Court will consider any suggestions or responses which are consistent with the desegregation purpose of this plan, from any suburban school district which will participate in the plan. Such responses shall be submitted within twenty days.

E. This Court retains jurisdiction of this action for all purposes, including the entry of such additional orders as may be necessary or proper.

PART THREE—LEGAL ASPECTS

The Court finds that this voluntary plan meets constitutional and judicial standards. The plan adopted herein is, in the opinion of the Court, fair, adequate and reasonable; educationally sound; and conducive to obtaining a proper level of constitutional compliance and will aid in eliminating the remaining vestiges of school segregation.

The plan constitutes a valid effort to implement the mandate of the United States Court of Appeals in *Adams v. United States,* 620 F.2d 1277, 1296 (8th Cir.), *cert. denied,* 101 S.Ct. 88 (1980):

> . . . The Board shall use other techniques to ensure students in all schools will receive equal educational opportunities. It shall seek the help of the state and federal governments in financing them. These techniques may include the following:
>
> > . . . (2) Developing and implementing programs providing less than full-time integrated learning experiences,
> >
> > (3) Developing and implementing a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County. The Board shall seek the cooperation of such school districts, the State Board of Education and the United States in developing and implementing such a plan. 620 F. Supp. at 1296.

This plan is also in accord with Judge Meredith's order of May 21, 1980, 491 F.Supp. 351, 353, to make

> every feasible effort to work out with the appropriate school districts in the St. Louis County and develop

> . . . a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein. . . .

The Court finds that the plan herein ordered would aid in reducing racial isolation and segregation in St. Louis. The Plan is designed to lead to an educationally sound and relatively expeditious means of promoting racial desegregation of the public schools throughout the metropolitan area, provided that a sufficient number of school districts in the area agree to participate in the plan and the plan proves effective.

A desegregation plan is not disapproved merely because it is voluntary. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), holds that the standard of a voluntary plan is the adequacy of the plan.

> The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Board of Education, 402 U.S. 1, 15 (1971).

In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Supreme Court said that application of these equitable principles required the federal courts to focus on three factors: (1) that the remedy is related to the condition alleged to offend the Constitution, (2) that the decree is indeed remedial, that is, it is designed to restore victims to the position they would have occupied absent the violation, and (3) that the remedy take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. 433 U.S. at 380-81. The Supreme Court has

recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court."

Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring).

The plan is purely voluntary. By participating in such a voluntary plan, the suburban school districts would enrich the educational opportunities for all children, would decrease racial isolation, and would enhance other cooperative efforts in the metropolitan area.

Pursuant to the mandate of the Eighth Circuit Court of Appeals, this Court can countenance no further delay in elimination of the vestiges of racial segregation in the St. Louis public school sytsem. Participation in this voluntary plan would be a factor in weighing the necessity of a compulsory inter-district plan. However, if the goal of constitutional compliance cannot be met through this voluntary plan, the Court must give serious consideration to the validity of the imposition of a compulsory inter-district remedy.

The plan is directly related to remedying racial segregation in St. Louis, which is the condition alleged to offend the Constitution. The plan is remedial in nature, both with respect to educational components and in the effort to provide integrated educational opportunities to students in St. Louis. Finally, the plan takes account of the interest of parents, students, and school boards in managing their own affairs.

Dated this 2nd day of July, 1981.

/s/ William Hungate
United States District Judge

APPENDIX H

(Filed August 24, 1981)

H(336)81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

ORDER

On July 2, 1981, the Court ordered the implementation of An Educational Plan for Voluntary, Cooperative Desegregation of Schools in this St. Louis, Missouri, Metropolitan Area. The Court directed the school districts from St. Louis, Jefferson and St. Charles Counties to indicate their willingness to participate in the voluntary plan no later than August 6, 1981.

Thirty-five school districts rejected participation in cooperative efforts to devise a voluntary solution to assist in alleviating the school segregation in St. Louis.

The Board of Education of the City of St. Louis unconditionally, and the following school districts from St. Louis County conditionally, agreed to participate in the voluntary plan:

School District of Clayton
Kirkwood School District R-7
Ritenour School District
School District of University City

Finding the school districts' willingness to participate to be a valid attempt to fashion a workable remedy pursuant to paragraph 12(a) of Judge Meredith's order dated May 21, 1980, in *Liddell v. Board of Education*, 491 F. Supp. 351, 353 (E.D. Mo. 1980), *aff'd*, No. 80-1458 (8th Cir., Feb. 13, 1981):

IT IS HEREBY ORDERED that the above-named school districts from St. Louis County, along with the Board of Education of the City of St. Louis, and the State defendants, be and the same are directed to implement the Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri, Metropolitan Area as a pilot project.

IT IS HEREBY FURTHER ORDERED that the pending motions to make the above-named school districts from St. Louis County party-defendants in this action, as well as related discovery, be and the same are stayed. This stay shall be effective as to any district for so long as it is participating in good faith to achieve a level of integration satisfactory to the Court.

IT IS HEREBY FURTHER ORDERED that the terms and conditions of acceptance proposed by each school district be and the same are approved to the extent that they are not inconsistent with the Voluntary, Cooperative Plan set forth in this Court's order dated July 2, 1981.

Dated this 24th day of August, 1981.

/s/ William Hungate
United States District Judge

APPENDIX I

(Filed August 24, 1981)

H(337)81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

ORDER

This matter is before the Court on the separate motions to file amended answers to add cross claims and to add additional parties, and motion to dismiss in response thereto.

On January 9, 1981, the Board of Education of the City of St. Louis filed its motion for leave to amend its answer and add cross claims, and on the same date filed a complementary motion for leave to add additional parties. A revised motion to substitute proper parties under Rule 25 was also filed May 28, 1981.

The intervenors-plaintiffs Caldwell filed their motion on January 16, 1981, for leave to add additional parties defendant and to file cross complaints against additional parties.

The thrust of the City Board and Caldwell motions is to add as additional parties the twenty-three school

districts in St. Louis County, the five school districts in St. Charles County, and the eleven school districts in Jefferson County; the Counties of St. Louis, St. Charles, and Jefferson; and the Missouri Housing Development Commission, the Housing Authority of St. Louis County, the Housing Authority of the City of St. Louis, the Land Clearance for Redevelopment Authority of St. Louis County and various State Officials.

The original action was initiated to redress alleged constitutional violations in the operation of racially segregated schools in the City of St. Louis. The cross claims allege constitutional violations of a racially dual structure of public education prior to 1954 and the failure to take action to eliminate vestiges of segregation in metropolitan St. Louis.

The cross claims seek declaratory and injunctive relief to redress alleged deprivation under color of state law of the rights, privileges, and immunities secured by the Constitution of the United States.

Plaintiffs Liddell filed a motion to dismiss the separate motions of the City Board and Caldwell.

To foster voluntary, cooperative planning under paragraph 12(a) of Judge Meredith's order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit, this Court deferred ruling on the separate motions of the City Board and Caldwell.

The Court conducted hearings on the 12(a) voluntary plans submitted by the Chairman of the Desegregation Monitoring Advisory Committee, the parties, and the court-appointed expert. On July 2, 1981, the Court entered its order, incorporating provisions for the proposed plans. The Court therein provided an opportunity for the school districts from St. Louis, Jefferson, and St. Charles Counties to indicate their willingness to participate in the 12(a)

voluntary plan no later than August 6, 1981. Only four school districts conditionally agreed to participate.

In light of the overwhelming rejection of the 12(a) voluntary plan, the Court is impelled to begin proceedings on a mandatory interdistrict plan pursuant to paragraph 12(c). In paragraph 12(c), Judge Meredith directed:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > (c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F.Supp. 351, 353 (E.D. Mo. 1980). On February 13, 1981, the United States Court of Appeals for the Eighth Circuit affirmed this Court's power to order a mandatory interdistrict remedy.

To enable the Court to fashion an effective remedy pursuant to paragraph 12(c), the Court is inexorably led to consideration of the motions filed by the City Board and Caldwell to join the school districts of St. Louis, Jefferson, and St. Charles Counties.

The Court has carefully considered Judge Meredith's Orders, as well as Eighth Circuit mandates; the motions of the City Board, Caldwell, and Liddell, along with the suggestions and memoranda filed by the movants and the numerous school districts and others who filed memoranda in opposition thereto as friends of the Court; and the entire record as a whole.

For purposes of Judge Meredith's directive in paragraph 12(c) to develop a compulsory interdistrict remedy:

IT IS HEREBY ORDERED that the motion of Liddell to dismiss the City Board's and Caldwell's motions be and the same is DENIED.

IT IS HEREBY FURTHER ORDERED that the separate motions of the City Board and Caldwell to file amended answers and to add cross claims and to add parties are granted in part and denied in part as set forth below:

1. The motions are GRANTED as to the following defendants pursuant to Rule 25(d) of the Federal Rules of Civil Procedure:

> The State of Missouri; Christopher S. Bond, Governor of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; Melvin E. Carnahan, Treasurer of the State of Missouri; Stephen C. Bradford, Commissioner of Administration of the State of Missouri; the State of Missouri Board of Education, and its members Erwin A. Williamson (President), Jimmy Robertson (Vice President), Grover A. Gamm, Delmar A. Cobble, Dale M. Thompson, Donald W. Shelton, and Robert Welling; and Arthur Mallory, Commissioner of Education of the State of Missouri.

2. The motions are STAYED, as well as related discovery, pending an evidentiary hearing as to the Ferguson-Florissant Board of Education.

The original Ferguson-Florissant School District was ordered by Judge Meredith to annex the school districts of Berkeley and Kinloch to achieve equality of educational opportunity and greater racial balance. *United States v. Missouri*, 388 F.Supp. 1058 (E.D. Mo.), remanded to fix new dates for accomplishment of the annexation, 515 F.2d 1365 (8th Cir.), *cert. denied* 423 U.S. 951 (1975).

In August of 1980, the Ferguson-Florissant School District was released from the jurisdiction of the federal court, which means that it was found to be in compliance with the Court's desegregation orders. There is substantial likelihood that involvement in this lawsuit might hamper the ongoing efforts of the Ferguson-Florissant School District to eliminate any remaining vestiges of segregation.

3. The motions are STAYED, as well as related discovery, pending an evidentiary hearing as to the following school districts:

ST. CHARLES COUNTY:

Ft. Zumwalt Board of Education
St. Charles Co. R-V Board of Education
Wentzville R-IV Board of Education
St. Charles Board of Education
Francis Howell R-III Board of Education

JEFFERSON COUNTY:

Dunklin R-V Board of Education
Hillsboro R-III Board of Education
Fox C-6 Board of Education
Festus R-VI Board of Education
47 Crystal City Board of Education
73 DeSoto Board of Education
Windsor C-1 Board of Education
Grandview R-II Board of Education
(E) Jefferson Co. R-VII Board of Education
Northwest Jefferson Co. R-1 Board of Education
(E) Sunrise R-IX Board of Education

4. The motions are STAYED, as well as related discovery, pending an evidentiary hearing as to St. Charles County and Jefferson County.

5. The motions are STAYED, as well as related discovery, as to the following districts, which have indicated their willingness to participate in the 12(a) voluntary plan:

Clayton Board of Education
Kirkwood Board of Education
Ritenour Board of Education
University City Board of Education

This stay shall be effective for so long as the school district is participating in good faith to achieve a level of integration satisfactory to the Court.

6. The motions are STAYED, as well as related discovery, pending an evidentiary hearing as to the Missouri Housing Development Commission, the Housing Authority of the City of St. Louis, and the Land Clearance for Redevelopment Authority of St. Louis County.

7. The motions are GRANTED as to the following school districts in St. Louis County, which are necessary parties for a complete determination of this lawsuit under paragraph 12(c) of Judge Meredith's order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit:

Affton Board of Education
Bayless Board of Education
Brentwood Board of Education
Hancock Place Board of Education
Hazelwood Board of Education
Jennings Board of Education
Ladue Board of Education
Lindbergh Board of Education
Maplewood-Richmond Heights Board of Education
Mehlville Board of Education

Normandy Board of Education
Parkway Board of Education
Pattonville Board of Education
Riverview Gardens Board of Education
Rockwood Board of Education
Valley Park Board of Education
Webster Groves Board of Education
Wellston Board of Education

8. The motions are GRANTED as to St. Louis County. The Court on its own motion also names the following St. Louis County government officials as party defendants:

County Executive, Gene McNary
County Treasurer, Harlow Richardson
Collector of St. Louis County
Contract Account, George C. Leachman

IT IS HEREBY FURTHER ORDERED that all discovery herein shall be complete within 90 days except for good cause shown, and except as to those parties to whom stays were specifically granted in this order. Within 75 days of the date of this order, any district unable to complete discovery shall state what discovery remains to be completed.

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

To develop and submit to the Court by February 1, 1982, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

IT IS HEREBY FURTHER ORDERED that a hearing on the 12(c) aspects of this cause, involving both alleged constitutional violations and proposed remedies, be and the same is set for March 1, 1982, at 10:00 a.m.

Dated this 24th day of August, 1981.

/s/ William Hungate
United States District Judge

(Filed August 24, 1981)

H(338)81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

ORDER

This matter is before the Court sua sponte. The Court is of the opinion that to further the administration of justice, the public interest should be represented in this case.

To ensure a complete and plenary presentation of the complex issues related to paragraphs 12(c) and 12(d) of Judge Meredith's order dated May 21, 1980, so that the Court may reach a proper decision,

IT IS HEREBY ORDERED that Shulamith Simon, Attorney at Law, be and she is appointed as amicus curiae to call witnesses, file pleadings, and perform such other functions as necessary to ensure the adequate representation of the public interest related to the paragraph 12(c) and 12(d) issues pending before the Court.

IT IS HEREBY FURTHER ORDERED that the fees and expenses of the amicus curiae shall be taxed as costs in this cause.

IT IS HEREBY FURTHER ORDERED that the parties shall provide copies of all pleadings and other documents filed with the Court to the appointed amicus curiae:

Shulamith Simon, Esq.
Husch, Eppenberger, Donohue,
Elson and Cornfeld
100 North Broadway
St. Louis, Missouri 63102

Dated this 24th day of August, 1981.

/s/ William Hungate
United States District Judge

APPENDIX J

(Filed August 25, 1981)

H(340)81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

INSTRUCTIONS TO COURT-APPOINTED EXPERTS

To provide expert assistance to this Court in developing and implementing a mandatory, interdistrict desegregation remedy pursuant to paragraph 12(c) of Judge Meredith's order dated May 21, 1980, as amended, and as affirmed by the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that the educational experts appointed by the Court on August 1, 1981, H(285)81, be and they are directed to begin assembling data necessary for devising a mandatory interdistrict remedy pursuant to paragraph 12(c) for presentation to the parties for implementation in the 1982-83 school year.

IT IS HEREBY FURTHER ORDERED that on or before September 7, 1981, the experts shall file a proposed timetable for outlining the broad parameters of a 12(c) mandatory interdistrict plan. The framework shall be

submitted to the Court before the expiration of their 90-day appointment, November 16, 1981.

IT IS HEREBY FURTHER ORDERED that the motion to modify duties of the court-appointed educational experts filed by the plaintiffs-intervenors Caldwell and the plaintiff-intervenor City of St. Louis, H(324)81, be and the same is denied as moot pursuant to this Court's order dated August 20, 1981, H(329)81.

Dated this 25th day of August, 1981.

/s/ William Hungate
United States District Judge

APPENDIX K

Michigan Statutes Cited By United States Supreme Court in *Milliken I* as Establishing Local Autonomy	Corresponding Missouri Statutes
1. Mich.Comp.Laws, Section 340.27, 340.55, 340.107, 340.148, 340.149, 340.188 (1967). School districts are described as autonomous political bodies corporate, operating through boards of education popularly elected.	Sections 162.461, 162.511, 162.571, 162.621 RSMo 1978.
2. Mich.Comp.Laws, Sections 340.24, 340.26, 340.77, 340.113, 340.165, 340.192, 340.352 (1967). School districts have plenary power to acquire real and personal property.	Sections 160.011, 162.441, 162.461, 162.571, 177.011 RSMo 1978.
3. Mich.Comp.Laws, Section 340.569, 340.574 (1967). School districts have plenary power to hire and contract with personnel.	Chapter 168 RSMo 1978.
4. Mich.Comp.Laws, Section 340.563 (1967). School districts have plenary power to levy taxes for operations.	Sections 164.011, 164.021, 164.071 RSMo 1978 (with a minimum levy requirement for Missouri state aid under Section 163.021 RSMo 1978.)

5. Mich.Comp.Laws, Sec-340.575 (1967). School districts have plenary power to determine the length of school terms.	Section 171.031 RSMo 1978.
6. Mich.Comp.Laws, Section 340.582 (1967). School districts have plenary power to control the admission of non-resident students.	Section 167.151 RSMo 1978.
7. Mich.Comp.Laws, Section 340.583 (1968). School districts have plenary power to determine courses of study.	Section 171.011 RSMo 1978 (with minimum requirements for materials and subjects set forth in Chapter 170 RSMo 1978).
8. Mich.Comp.Laws, Section 340.584 (1967). School districts have plenary power to provide a kindergarten program.	Sections 163.013, 163.017 RSMo 1978.
9. Mich.Comp.Laws, Section 340.585 (1967). School districts have plenary power to establish and operate vocational schools.	Sections 178.450, 178.490, 178.530 RSMo 1978.
10. Mich.Comp.Laws, Section 340.586 (1967). School districts have plenary power to offer adult educational programs.	Sections 171.091, 171.096 RSMo 1978.
11. Mich.Comp.Laws, Section 340.589 (1967). School districts have plenary power	Sections 177.091, 177.131, 177.161, 171.011 RSMo 1978 (derived from the power to

to establish attendance areas.	select sites and establish an adequate number of schools, coupled with the power to make all needful rules and regulations.)
12. Mich.Comp.Laws, Section 340.591 (1967). School districts have plenary power to arrange for the transportation of non-resident students.	Sections 167.231, 167.241, 163.161 RSMo Supp. 1980 (with state aid in Missouri computed for the transportation of certain eligible students, and with the district of residence being required to provide transportation in certain instances where non-resident students are assigned to a school.)
13. Mich.Comp.Laws, Section 340.594 (1967). School districts have plenary power to acquire transportation equipment.	Section 167.251 RSMo 1978.
14. Mich.Comp.Laws, Section 340.605 (1967). School districts have plenary power to receive gifts and bequests for educational purposes.	Section 165.011 RSMo 1978.
15. Mich.Comp.Laws, Section 340.609 (1967). School districts have plenary power to employ any attorney.	Sections 162.411, 162.511, 162.571 RSMo 1978.
16. Mich.Comp.Laws, Section 340.613 (1967). School districts have plenary power to suspend or expel students.	Sections 167.161, 167.171 RSMo 1978.

17. Mich.Comp.Laws, Section 340.614 (1967). School districts have plenary power to make rules and regulations for the operation of school.	Section 177.011 RSMo 1978.
18. Mich.Comp.Laws, Section 340.711 (1967). School districts have plenary power to acquire property by eminent domain.	Section 177.041 RSMo 1978.
19. Mich.Comp.Laws, Section 340.882 (1967). School districts have plenary power to approve and select textbooks.	Section 170.051 RSMo 1978 (with Missouri districts required to purchase and loan free all textbooks chosen from lists filed with the State Board of Education, the districts retaining additional authority to expend textbook monies and incidental fund money for the purchase of supplementary texts and materials.) Constitution of Missouri Article III Section 40: Limitations on passage of local and special laws. The general assembly shall not pass any local or special law: (20) creating new townships or changing the boundaries of townships or school districts;

(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;

(24) regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes.

Office - Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS,
CLERK

Attorney General of Missouri
POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 23, 1981

Mr. Alexander L. Stevas, Esq.
Clerk, United States Supreme Court
Washington, D.C. 20543

Re: State of Missouri, et al., petitioners v. Craton Liddell, et al., respondents, No. 80-2152

Dear Mr. Stevas:

Enclosed herewith please find 40 copies of the United States District Court's Order and Memorandum of September 21, 1981, which the petitioners wish to submit for the Court's consideration in the above-referenced case. This Order was entered after the filing of the petitioners' supplemental brief and could not be included therein. However, the Order and Memorandum are being forwarded to the Court in keeping with your request to Ms. Eyvon Mendenhall, Clerk of the United States District Court for the Eastern District of Missouri, that all documents filed in the above-referenced case since May 1, 1981, be forwarded to the Supreme Court for their consideration.

The Order in question is a denial of a motion by the United States to strike that portion of the District Court's August 24, 1981 Order relating to the development for a plan for inter-district desegregation (what has commonly been called the 12(c) plan). The District Court's August 24, 1981 Order was included as Appendix I of the petitioner's supplemental brief. The motion of the United States referred to above has now been presented to this Court as Appendix B in the brief of amicus curiae, the School District of the City of Ladue.

The petitioners wish to call particular attention to the language contained on page 4 of the attached Memorandum, starting with the first full paragraph. The District Court states therein that there is already sufficient evidence in the record to justify

the imposition of an inter-district remedy, such as that comtemplated by paragraph 12(c) of the District Court's May 21, 1980 Order. The petitioners believe that this most recent Order has particular relevance to the argument appearing at pages 28 through 30 of its initial petition and pages 5 through 6 of its supplemental brief

If you need any additional information, please let us know.

Very truly yours,

JOHN ASHCROFT
Attorney General

Larry R. Marshall

Larry R. Marshall
Assistant Attorney General

LRM/rm

cc: Counsel of Record
Enclosure

RECEIVED
SEP 22 '81
MO. [illegible]

H(462)81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
SEP 21 1981
EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

CRATON LIDDELL, et al.,)
)
Plaintiffs,)
)
v.) No. 72-100C(4)
)
THE BOARD OF EDUCATION)
OF THE CITY OF ST. LOUIS,)
STATE OF MISSOURI, et al.,)
)
Defendants.)

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of the United States to modify Order H(337)81 be and the same is granted in part and denied in part as set forth in the incorporated memorandum.

Dated this 21st day of September, 1981.

UNITED STATES DISTRICT JUDGE

RECEIVED
SEP 22 '81
MO. ATTORNEY GENERAL
FILED
SEP 21 1981
EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,
Plaintiffs,
v.
THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

No. 72-100C(4)

MEMORANDUM

This matter is before the Court on H(360)81, the motion of the United States to modify Order H(337)81. For the reasons stated below, the motion to modify will be granted in part and denied in part.

On August 24, 1981, this Court entered its Order H(337)81, which, inter alia, provides that

> IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > To develop and submit to the Court by February 1, 1982, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government imposed school segregation in the City of St. Louis and St. Louis County.

The United States now moves the Court to modify Order H(337)81 by striking the above-quoted portion or, in the alternative, by modifying the language to delete references to the United States, consistent with the following provisions of Judge Meredith's September 17, 1980, order.

> It appears to the Court that it is highly important that the efforts of the United States, the State, and the St. Louis Board of Education, heretofore developed with the cooperation of county school districts should be continued and intensified. This and other considerations indicate the advisability of changing timetables and certain aspects of the parties' participation in some of the programs which are the subject of subparagraphs (a) through (d) of paragraph 12.

* * *

> 3. Paragraph 12(c) is hereby amended as to the following provisions: On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of interdistrict school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

On March 19, 1981, the United States Court of Appeals for the Eighth Circuit affirmed not only the provisions of paragraph 12(c) in Judge Meredith's September 17, 1980, Order, but also expressly declined to change its February 13, 1981, mandate that affirmed paragraph 12(c) as originally written.

After reviewing Judge Meredith's original and amended orders, the Court of Appeals held that

> The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that the provisions of paragraph 12, both as originally written and as amended, must be enforced. . . . In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations (citation omitted). Paragraphs 12(a)-(c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.
>
> The State of Missouri's motion [to stay the Court of Appeals' mandate dated February 13, 1981, or to stay enforcement of the district court's orders] is denied. We order prompt implementation of our mandate in Liddell v. Board of Educ., Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir., Feb. 13, 1981). (emphasis added).

Liddell v. Board of Educ., No. 80-1458, slip op. at 17 (8th Cir., Mar. 19, 1981).

In light of the Court of Appeals' adherence to its February 13, 1981, pronouncement concerning the legal responsibilities of the

State of Missouri for the prompt desegregation of the St. Louis public school system, id. at 12, the request of the United States for deletion of the above-quoted portions of Order H(337)81 will be denied.

In the alternative, the United States requests that the Court eliminate the United States from the reporting provisions of Order H(337)81.

Plaintiffs-intervenors Adams object to relieving the United States of any responsibilities under paragraph 12(c) as set forth in Judge Meredith's May 21, 1980, Order. Because the United States did not seek appellate review of the paragraph 12(c) reporting requirements, Adams asserts that this Court should not permit the United States now to avoid carrying out its obligations.

The State defendants support the United States' motion to terminate any reporting under paragraph 12(c) of the May 21, 1980, Order pending a trial on the merits of the recently filed amended complaint and cross-claim against the county school districts.

On February 13, 1981, the Court of Appeals took judicial notice that the City Board and Caldwell had filed amended complaints asking the district court to require interdistrict integration with the schools of St. Louis, St. Charles, and Jefferson Counties. Without expressing an opinion as to the merits of the proposed amendments, the Court of Appeals emphasized that

> the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the [desegregation] plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration [paragraphs 12(a)-(c)].

Liddell v. Board of Educ., No. 80-1458, slip op. at 10 (8th Cir., Feb. 13, 1981).

The Court cannot terminate the reporting provisions of paragraph 12(c) without disobeying the foregoing mandate of the United States Court of Appeals for the Eighth Circuit.

Notwithstanding the appellate court mandate, the State defendants argue that it is improper to order the preparation of a

mandatory interdistrict remedy until such time as a constitutional violation has been found which in fact has an interdistrict effect. See Swann v. Charlotte Mecklenberg Board of Educ., 402 U.S. 1 (1971)(emphasizing that the scope of the remedy is determined by the nature of the constitutional violation).

The Court of Appeals explicitly found that paragraph 12(c) of Judge Meredith's May 21, 1980, Order is within the authority of the district court to remedy segregation imposed by the State or other defendants. Id. at 19-20. The record is replete with evidence of discriminatory action and inaction by the State of Missouri. See, e.g., Adams v. United States, No. 79-1468, slip op. at 7-8 (8th Cir., Mar. 3, 1980), setting forth the following historical background of this case:

> Prior to the Civil War, a Missouri statute provided: "No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State." Act of February 16, 1847, § 1, 1847 Mo. Laws 103. Beginning in 1865, the Missouri General Assembly enacted a series of statutes requiring separate public schools for blacks. See, e.g., Act of February 17, 1865, § 13, 1865 Mo. Laws 226. This segregated system was incorporated into the Missouri Constitution of 1945, which specifically provided that separate schools were to be maintained for "white and colored children." See Mo. Const. art. IX, § 1(a) (1945). Although a 1954 Attorney General opinion declared this provision unenforceable following Brown I, it remained a part of the state constitution until repealed in 1976. Statutes implementing the constitutionally mandated segregation provided for separate funding, separate enumerations, separate consolidated "colored" school districts, and the interdistrict transfer of black students. Most of these statutes were not repealed until 1957. See Act of July 6, 1957, § 1, 1957 Mo. Laws 452.

See also Liddell v. Board of Educ., 491 F.Supp. 351, 359-60 (E.D. Mo. 1980).

In light of the Court's finding of unconstitutional segregation imposed by the state government and other defendants, the Court of Appeals stressed the legal obligation of the United States, the State of Missouri, and Board of Education to develop and implement the plans contemplated by paragraph 12 of Judge Meredith's May 21, 1980, Order. Liddell v. Board of Educ., No. 80-1458, slip op. at

20, n.6 (8th Cir., Feb. 13, 1981)(mandating that "the district court countenance no excuse for further delay" in implementing the paragraph 12 plans).

The United States advises that it is always available to assist the Court upon request. The record indicates that since the United States intervened in this case in 1977, the federal government has consistently pursued a policy of assisting the State and local governments to devise plans to provide complete and lasting desegregation in the St. Louis public schools.

In contrast to its previous efforts to devise a desegregation remedy in cooperation with the city and county districts, the United States currently is not seeking a 12(c) interdistrict remedy. As a plaintiff-intervenor, the United States maintains that the obligation to develop a plan pursuant to paragraph 12(c) of Judge Meredith's orders is on the defendant State of Missouri and defendant Board of Education of the City of St. Louis.

Although the Court of Appeals stressed the obligation of the United States to comply with paragraph 12(c) of Judge Meredith's May 21, 1980, Order, the appeals court noted that no party had named the United States as a defendant and alleged that it engaged in discriminatory practices. Id. at 26.

Unless compelled to grant affirmative relief against the United States, the Court believes that the executive branch has a right to change its school desegregation policies. Therefore, the request of the United States to be relieved of its reporting responsibilities under Order H(337)81 will be granted.

The City Board supports the portion of the motion of the United States to modify Order H(337)81 to reflect the changes made in paragraph 12(c) by Judge Meredith's Order dated September 17, 1980, supra.

The original version of paragraph 12(c) required the development of a plan to correct "the remaining vestiges of government-imposed school segregation in the City of St. Louis

and St. Louis County." The City Board agrees with the government's assertion that the original version imposes an awkward limitation on the 12(c) planning process and submits that the problem was corrected in the amended version of paragraph 12(c), which required the development of a plan that would be "limited only by considerations of feasibility and practicality."

Adams rejects the position of the City Board as an attempt to interpose spurious delays in carrying out the original version of paragraph 12(c), which ordered that an interdistrict desegregation plan be presented to the Court sixteen months ago. Because the liability of the City Board and State has been determined by Judge Meredith and affirmed by the Court of Appeals, Adams contends that there is no legitimate reason to permit further delay in addressing the scope of the remedy necessary to alleviate the remaining vestiges of government-imposed school segregation.

The City Board prefers to expand the original version of paragraph 12(c), which was limited to the City of St. Louis and St. Louis County, to include suburban school districts beyond St. Louis County. The Court has stayed its ruling until an evidentiary hearing may be held on expanding this litigation to include school districts in St. Charles and Jefferson Counties. The Court has also stayed discovery and claims against the school districts in St. Louis County that are voluntarily participating in a cooperative plan to achieve complete and lasting desegregation.

Having carefully considered paragraph 12(c) of Judge Meredith's Order dated May 21, 1980, as amended by his order dated September 17, 1980; the mandates of the United States Court of Appeals for the Eighth Circuit; the arguments of counsel; and the record as a whole, Order H(337)81 will be amended to read as follows:

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's Order dated May 21,

1980, as amended and as affirmed by the United States Court of Appeals, that the State defendants and the Board of Education of the City of St. Louis are ordered and directed as follows:

> To develop and submit to the Court by February 1, 1982, a suggested plan for inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

Dated this 21st day of September, 1981.

UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
AUG 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

CRATON LIDDELL, *et al.*,

and

EARLINE CALDWELL, *et al.*,

and

JANICE ADAMS, *et al.*,

and

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,

and

THE CITY OF ST. LOUIS, MISSOURI,

and

THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, EARLINE CALDWELL, *et al.*

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August 17, 1981

Counter-Statement of the Questions Presented

1. Whether, under controlling Fourteenth Amendment principles as enunciated by this Court in *Brown I* and *II* and their progeny, a finding of present day, unliquidated public school segregation in a state that formerly imposed such segregation pursuant to state constitution, statutes and laws, requires a district court and court of appeals to direct state officials to take all steps necessary to dismantle such segregation and eliminate its vestiges, including the assumption of a proportional share of the costs of the remedy?

2. Whether, upon a finding by the courts below that intradistrict public school desegregation will not alleviate completely the effects of historical, state-imposed segregation, the courts may, in the exercise of their equitable duties to devise remedies that eliminate such segregation "root and branch", direct state officials, who have been adjudicated to be "primary constitutional wrongdoers", to develop plans for the removal of the vestiges of such segregation; and, whether, in any event, the plan-development components of such an order are properly before or ripe for review by this Court?

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No. 80-2152

IN THE

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OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,

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CRATON LIDDELL, *et al.*,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, EARLINE CALDWELL, *et al.*

Petitioners, the State of Missouri, et al., seek a Writ of Certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 3, 1980. *Adams* v. *United*

States, 620 F.2d 1277 (8th Cir. 1980), Nos. 79-1468, 79-1470, 79-1471, 79-1477 and 79-1478. Petitions for rehearing and clarification of that judgment and opinion were denied on April 10, 1980. A petition for certiorari, filed by the Adams plaintiffs-intervenors was denied. 101 S. Ct. 88 (1980). Petitioners did not seek review at that time. Petitioners also seek a review of the judgment and opinion of the Eighth Circuit Court of Appeals entered on February 13, 1981, *Liddell, et al.* v. *Board of Education of the City of St. Louis, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735. Petitioners' Appendix (Pet. A-1). A petition for rehearing filed by the Caldwell plaintiffs-intervenors; a stay of the issuance and/or enforcement of the mandate, filed by the State defendants; and leave to intervene for purposes of filing a petition for certiorari, filed by the Special School District of St. Louis County were denied by the court of appeals on March 19, 1981 (Pet. A-25).

Respondents, Earline Caldwell, the St. Louis Branch of the National Association for the Advancement of Colored People, et al., respectfully prays this Court to deny the Petition.

Counter-Statement of the Case

The original complaint in this school desegregation action was filed on February 18, 1972, by the Liddell plaintiffs, black parents of students in the St. Louis, Missouri public schools, on behalf of themselves and others similarly situated. Named as defendants were the Board of Education of the City of St. Louis, its individual members, Superintendent of Schools and district superintendents.

On December 24, 1975, the parties entered into a consent decree. Subsequently, respondents, Earline Caldwell, et al.,

filed objections to the decree and a motion to intervene as plaintiffs. The district court denied the motion on January 23, 1976. On appeal, the United States Court of Appeals for the Eighth Circuit reversed. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976). A petition for certiorari, filed by the Board of Education, was denied by this Court. *St. Louis Board of Education* v. *Caldwell, et al.,* 433 U.S. 914 (1977).

In remanding the case, the court of appeals directed the district court to immediately grant the petition for intervention and ". . . to hear, as soon as possible, any objections to the school board's . . . plan, and . . . require the parties to submit alternative plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term." 546 F.2d at 774.[1]

The court of appeals further suggested that the district court invite the United States Department of Justice and Missouri State Board of Education to intervene, and that a bi-racial citizens advisory committee be created. *Id.*

On remand, the United States did intervene. In addition, the State of Missouri, the Commissioner of Education of the State of Missouri and the State of Missouri Board of Education were made parties-defendant. Adams, et al. and the City of St. Louis also sought and were granted intervention as plaintiffs.

Subsequently, the district court determined that the scope of remand hearings would include (1) the nature and ex-

[1] The court noted that, while it was not addressing the merits of the consent decree, "if the overall plan to be submitted by the Board contains major deficiencies in the areas asserted, the plan will encounter serious constitutional objections." *Id.*, at 773.

tent of the defendants' constitutional violation and (2) if liability was found, the appropriate remedy.[2]

Following trial, the district court issued its opinion, *Liddell* v. *Board of Education of the City of St. Louis*, 469 F.Supp. 1304 (E.D. Mo. 1979), finding that the state-imposed statutory system of racial segregation in the St. Louis public schools had been dismantled.

On appeal, an en banc panel of the Eighth Circuit, in an opinion signed by each member of the panel, reversed. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980). The court held that:

> A careful review of the record and the controlling law, however, convinces us that the district court was clearly in error as to the constitutional requirements imposed on defendants who have formerly discriminated pursuant to state law. It also erred in its evaluation of the extent to which the defendants have met those requirements.

Id. at 1285. The court of appeals found, based upon its independent review of the entire record, that, "[t]he St. Louis Board of Education failed to take effective measures to desegregate the school system in the years immediately following *Brown I* and has subsequently enforced policies with respect to the assignment of students, the transpor-

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[2] A plan for the reduction of racial isolation in the city's secondary schools had been submitted to the district court on February 28 and March 10, 1977. Objections were filed by the parties. A hearing on the plan was held in April, 1977. The district court found that the only aspect of the Board's plan on which there was agreement was that concerning the establishment of certain magnet schools. The district court directed the Board to proceed with implementation of the magnet school component. The court, however, reserved ruling on the remainder of the plan.

Subsequently, the Liddell plaintiffs, Caldwell intervening-plaintiffs and the United States submitted alternative desegregation plans.

tation of students, the assignment of personnel and the construction of school facilities which cannot be reasonably explained without reference to racial concerns and which have contributed substantially to continuing segregation in the school system. *Id.* at 1280. The court further found that "actions of the state and federal governments, have intensified racial segregation in North St. Louis." *Id.* at 1291.

Having concluded that the defendants were liable for constitutional violations having systemwide impact, the court of appeals directed that "[a]n integrated system must be devised and implemented promptly." *Id.* at 1291.[3] The court ordered that "[t]he Board of Education . . . be given the principal responsibility for developing and implementing a comprehensive plan to integrate the school system" (*id.* at 1295), and that "[t]he costs of the plan shall be apportioned among the defendants as determined by the district court." *Id.* at 1295 n.28.

Only the Adams plaintiffs-intervenors sought review of the decision of the court of appeals.[4] Their petition for certiorari was denied. *Adams* v. *United States*, 101 S. Ct. 88 (1980).

Subsequently, on April 28, 1980, the Eighth Circuit issued a supplemental opinion in which it apportioned,

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[3] The court of appeals ordered that the Board be required to submit its proposed plan within sixty days of the issuance of the court's mandate. The plan was to be reviewed by the district court to insure its compliance with the mandate. Implementation of the plan was to commence no later than the beginning of the 1980-81 school year. *Id.* at 1295.

[4] On April 10, 1980, a petition for rehearing, filed by the intervening plaintiff, the City of St. Louis, and a motion for clarification, filed by the defendant, Board of Education of the City of St. Louis, were denied by the court of appeals. Subsequently, the St. Louis Board of Education voted not to seek further review of the decision of the court of appeals.

among the St. Louis Board and State defendants, the attorneys' fees and costs of the appeal. No review of this order was sought by any party.

The St. Louis Board timely filed its proposed desegregation plan. The district court scheduled hearings on the plan to commence on May 12, 1980.

Prior to the scheduled hearings, each of the parties submitted to the district court position papers and proposed orders outlining the relief each sought. The St. Louis Board (supported by the United States) and Caldwell intervening plaintiffs both made claims, *inter alia,* for funding, plan-development and plan-implementation relief against the State defendants. The State defendants' submission included requests that the Board's plan be approved on the following conditions: that remedial programs and magnet schools "not absolutely necessary to desegregation be stricken"; that the United States be held responsible for funding the plan to the same extent as the State of Missouri; that the State Board of Education be ordered to undertake a study and prepare a plan for 1981-82 implementation, combining the separate vocational-technical schools of the City of St. Louis and St. Louis County, in accordance with state statutes and regulations.

On May 21, 1980, subsequent to the hearings, the district court issued its remedial order approving the Board's proposed plan. *Liddell* v. *Board of Education of the City of St. Louis,* 491 F.Supp. 351 (E.D. Mo. 1980). The order directed, *inter alia,* the Board to implement the plan commencing with the 1980-81 school year; the State defendants to pay one-half of the costs of implementation of the plan; the State defendants, United States and St. Louis Board to develop plans including for the (1) voluntary cooperative interdistrict pupil exchanges to assist in alleviating the school segregation in the City of St. Louis [¶ 12(a)]; (2) merger or consolidation of separate vocational programs

operated by the Special District of St. Louis County and the St. Louis Board [¶ 12(b)]; (3) interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.[5]

On June 2, 1980, the district court filed supplemental findings of fact and conclusions of law in support of its May 21, 1980 order. 491 F.Supp. at 355.

On June 27, 1980, the district court entered two orders: granting (1) a motion by the Caldwell intervening-plaintiffs for leave to file, pursuant to Rule 15, F.R.Civ.P., a supplemental complaint to conform with the evidence against the State defendants; and (2) motions filed by the Caldwell intervening-plaintiffs, the United States and St. Louis Board to add as additional parties-defendant, the Governor, Attorney General and Treasurer of the State of Missouri, for the purpose of having before the Court all parties necessary for complete relief.

Four parties appealed from various aspects of the district court's May 21, 1980 order; the State defendants, Adams, Caldwell and Liddell plaintiffs. On February 13, 1981, the Court of Appeals for the Eighth Circuit issued its order affirming, in all respects, the district court's order. *Liddell* v. *Board of Education of the City of St. Louis*, Pet. A-1. On March 19, 1981, the appellate court issued an order in which it denied rehearing of its February 13 order and a motion for a stay of the issuance of the mandate and enforcement of paragraphs 12(a), (b) and (c) of the district court's May 21, 1980 order pending the filing of the within petition for a writ of certiorari. Pet. A-25.

On June 17, 1981, this petition for a writ of certiorari was filed by the State defendants.

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[5] The ¶ 12(c) reporting requirement was terminated by the district court on June 23, 1981. All other requirements under ¶ 12(c) had been suspended April 1, 1981.

Reasons for Denying the Writ

1. The Record Evidence Overwhelmingly Supports the Lower Courts' Findings as to the Constitutional Inadequacy of the St. Louis Board's 1954-1956 "Desegregation" Plan; the Primary Role of the Petitioners' Constitutional Liability for Failing to Assume Their *Brown I* and *II* Obligations and Thereafter, Exacerbating Unremedied Public School Segregation; and the Remedial Order Including the Requirement that Petitioners Pay One-Half of the Costs of the Remedy.

a. Petitioners argue that the court of appeals erred in determining that the plan for desegregation adopted on June 22, 1954, by the St. Louis Board of Education did not effectively dismantle the prior state-imposed racially dual system of schools. The basis of the court's error, according to petitioners, is its use of 1962 racial data which revealed that all of the twenty-eight elementary schools which had been all black in 1954, remained all or virtually black in 1962, and fifty of the formerly all white schools remained 85% or more white in 1962. 620 F.2d at 1291. Petitioners assert that, rather than demonstrating the lack of effectiveness of the St. Louis Board's 1954 plan, the 1962 statistics actually are evidence of the massive demographic shifts occurring in St. Louis in that period.

This claim, raised for the first time in the current effort by petitioners to obtain review, is without factual or legal basis. The petitioners did not seek review from the court of appeals' 1980 order reversing the district court's finding of no constitutional liability of either the St. Louis and State defendants for the unliquidated dual system of public schools extant in the district at the time. 620 F.2d 1277 (8th Cir. 1980).

Moreover, contrary to the petitioners' assertion, the court of appeals' analysis of the effectiveness of the St. Louis

Board's 1954 plan is neither "hasty" nor "shallow" (Pet. 11), nor was the court's finding, that the plan did not meet *Brown* requirements, based solely on the 1962 racial statistics. Rather, the court below acknowledged that "there are few exact figures for the period immediately following implementation because the Board of Education kept no records of school racial composition." *Id.* at 1284. Nevertheless, the court conducted an independent review of the entire record, including the Board's 1954-56 plan, and concluded that "all the available data demonstrates that little desegregation actually occurred in 1954-56." *Id.*

The court found that the heart of the Board's plan was a "neighborhood school policy", *id.* at 1881, whose zones were nearly identifiable with racially identifiable neighborhoods. *Id.*

Any desegregative assignments that might have occurred under the 1954-56 plan were minimized, if not completely negated, by the availability of a "continuation transfer" that allowed a student, formerly enrolled in a segregated school but not resident in that school's new zone, to remain in his/her former school until graduation, unless the school was overcrowded.[6]

Additionally, the court found that the Board's 1954-56 plan left virtually undisturbed the segregative pattern of staff assignments extant in the district at the time of *Brown*. The court noted that "[of] twenty-eight pre-*Brown* black schools still in existence in 1962, twenty-six had faculties that were 100% black. The other two were Sumner High

[6] The Court, relying on a report, prepared by the Office of the Superintendent of Public Instruction in 1956, concluded that it was the district's intent and purpose to "freeze the (segregated) status quo of the district rather than to implement a desegregation plan. That report stated that when the 1954-56 plan was implemented, the school attendance zones were drawn so as to 'relocate the smallest possible number of pupils.'" *Id.* at 1286-87.

School (98.7% black) and Henry Elementary (82.8% black). Moreover, those formerly white schools that changed student racial identity between 1954 and 1962 tended to change faculty racial identity as well." (*Id.* at 1285).[7]

These findings, as well as controlling legal standards, are ignored by the petitioners who fail to cite any applicable doctrine of this Court (or even a court of appeals) with which the decision below is in conflict.[8] For example, the petitioners submit that the Board "establish[ed] procedures

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[7] As with student assignments, the Board's plan was not designed to have any significant effect upon the segregated personnel assignments. The post-*Brown* policy of the Board provided: "Whenever possible, both teaching and non-teaching employees will retain their present assignments." As the court of appeals found, "[p]reservation of the status quo, obviously, meant preservation of a segregated system" *Id.* at 1287. Such segregative staff assignments in a system with a history of segregation are of probative value in determining whether the district has effectively dismantled its former dual schools. "[W]here it is possible to identify a 'white school' or 'black school' simply by reference to the racial composition of teachers and staff . . . a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

[8] The petitioners' attempt to undercut the court of appeals' use of available statistics only buttresses the court's ultimate conclusion that the Board's plan was constitutionally inadequate. For example, petitioners note that 40% of the black students assigned to new schools chose to attend the previously all black high schools. Pet. at 9. They infer that the absence of whites in these schools was not a result of the redrawing of attendance zones for the formerly black high schools, which, while heavily black, were racially mixed, but rather can be "accounted for by the continuation option." (*Id.*) Petitioners miss the point. The continuation option permitted students to remain in their former, segregated schools. Such "freedom-of-choice" devices are an unacceptable response to the *Brown II* mandate. *Green* v. *County Board of Education of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968) (rejecting a "free transfer" plan, identical to that implemented by the St. Louis Board in 1954-56).

to ensure that students would be admitted to schools on a racially nondiscriminatory basis [and] that this policy . . . [led] to a substantial degree of racial mixture." Pet. 10. The petitioners provide no objective evidence supporting their claim of "substantial degree of racial mixing." And indeed, none exists. Nor do they provide any data, beyond mere speculation, for their contention, in any event irrelevant, that resegregation would have occurred by 1962 even if the defendants had taken affirmative action to desegregate the system. In any event, the duty of the St. Louis Board (and the petitioners themselves) was not simply to abandon its previous segregative policies and practices, but rather affirmatively "to take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board*, 391 U.S. at 437-438, *also see, Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28; *Keyes* v. *School District No. 1, Denver*, 413 U.S. at 200-201 n.11; *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 459 (1979); *Dayton Board of Education* v. *Brinkman (Dayton II)*, 443 U.S. 526, 538 (1979). The test of the Board's plan, therefore, was not simply whether it was facially neutral, as petitioners contend, but rather its effectiveness in dismantling the segregated public schools of St. Louis. *Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971).[9]

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[9] The petitioners' attempt to infer that what the court of appeals was requiring was a "particular racial balance" in the schools and "yearly adjustments" of attendance zones, (Pet. 9-10) is incorrect and misreads this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra* and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). In *Swann*, this Court approved the use of mathematical ratios as a useful starting point in shaping a remedy, rather than an inflexible requirement. *Id.* at 25. *Swann's* significance for the within case, however, which petitioners overlook, is its presumption against schools that are substantially disproportionate in their racial composition, and the

Here, there have been specific findings by the appellate and district courts that the defendants in this action, including the petitioners, "never took any effective steps to dismantle the dual system [the petitioners] had compelled by constitution, statutory law, practice and policy." 491 F. Supp. at 357. These findings are amply supported by the entire record, including but not limited to the 1962 racial statistics to which reference is made by the petitioners, as well as the controlling law. Further, it should be clear that petitioners' claim ultimately seeks dismantlement of an ongoing desegregation plan, one which they failed to challenge in this Court when it was put into effect, although they had ample opportunity to do so. Apart from a lack of merit of petitioners' claim this Court should exercise its discretion to deny a claim that would disrupt implementation of a desegregation plan.

b. Nor do petitioners' claim that the holding of state liability was incorrect, present any issue worthy of review. Their contention that it was not until after the district court entered its remedial opinion that they first had knowledge of the claims against them is simply not true. As early as the court of appeals' 1980 decision reversing the district court on the question of the constitutional liability of the St. Louis and State defendants, the petitioners were put on notice that the case was about an unliquidated dual system of public schools in St. Louis, and the petitioners' failure to assume their affirmative ob-

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burden on school authorities to show that school assignments under a plan are truly nondiscriminatory. *Id.*

Nor does *Pasadena* provide support for the petitioners' position. Unlike the situation in *Pasadena*, the courts below, specifically found that the St. Louis Board had never satisfied its *Brown II* affirmative duty and that post-*Brown* changes in the racial composition of the district's schools "were caused by segregative actions chargeable to the defendants." *Pasadena City Board of Education* v. *Spangler*, 427 U.S. at 435.

ligation to dismantle, and actions in exacerbating, that system. Moreover, prior to the May 12-16, 1980 hearings on the St. Louis Board's proposed desegregation plan, both respondents and the Board filed separate memoranda on the remedial obligations of the petitioners. The submissions contained requests for specific relief against the petitioners based upon their adjudged role as a constitutional wrongdoer. These claims were fully litigated during the hearings. Subsequently, the district court made independent findings of liability against the petitioners. 491 F.Supp. at 357. Those findings were affirmed by the court of appeals. Pet. A-22-23.

In the alternative, petitioners argue that, in any event, they have engaged in no constitutional violation because after *Brown* they repealed all state statutes requiring segregation and established an administrative remedy. (Pet. 16-17)

This argument erroneously assumes that Fourteenth Amendment liability may be premised only on some overt act of a state entity or agent. This Court, however, has made it abundantly clear that *Brown* and its progeny impose an affirmative duty to desegregate. "If school authorities *fail* in their affirmative obligations under these holdings . . . judicial authority may be invoked." *Green* v. *County School Board*, 391 U.S. at 438; *Columbus Board of Education* v. *Penick*, 443 U.S. at 459 (1979), *quoting*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971).

Nor may petitioners attempt to evade *their* constitutional obligations with claims that they delegated to local entities the responsibility to comply with *Brown* and assumed compliance had been achieved. "[T]he commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among

various agents." *Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1958).[10]

Alternatively, petitioners contend that, even assuming their liability, it was error for the courts below to require them to pay one-half the costs of St. Louis desegregation. But the only reason suggested by petitioners is that they "are in a better position than the district court to make a judgment as to how that obligation can best be met." Pet.-19.

Here, the petitioners have been adjudicated to be "primary constitutional wrongdoers". 491 F.Supp. at 357. Precedential decisions of this Court support the authority of the district court to direct petitioners' full involvement in the remedy, including the payment of a share of the costs thereof, to determine the amount of the share, and to order all necessary relief to remedy "the condition that offends the Constitution." *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267, 282 (1977).

Petitioners make no claim that the St. Louis remedy exceeded the scope of the violation found. Nor have they presented any evidence supporting an abuse of discretion of the lower courts in apportioning the costs of implementation equally against the St. Louis Board and petitioners.[11]

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[10] Nor do the petitioners make any mention of the evidence in the record and findings of the courts below of their *active* role in exacerbating the public school segregation they initially mandated and later ignored. Among these findings were specific findings of state laws and policies mandating discrimination in housing, 620 F.2d at 1291, *summarizing findings in*, 469 F.Supp. at 1304.

[11] The apportionment of such costs directed by the district court is consistent with that ordered by courts in other school desegregation cases. *E.g.*, *Milliken II*, 433 U.S. 267 (1977); *Reed* v. *Rhodes*, 500 F.Supp. 404 (N.D. Ohio 1980); *Penick* v. *Columbus Board of Education*, —— F.Supp. —— (S.D. Ohio January 8, 1981), *Oliver* v. *Kalamazoo Board of Education*, 368 F.Supp. 143 (W.D. Mich. 1973); *aff'd*, 508 F.2d 178 (6th Cir. 1974), *cert. denied* 421

2. Based Upon the Entire Record, the Findings of the Lower Courts and Applicable Constitutional Standards as Set Forth in *Milliken I* and *II* and *Hills* v. *Gautreaux*, the Paragraph 12 Provisions of the Remedial Order Do Not Exceed the Scope of the Petitioners' Adjudicated Constitutional Violation; and, in Any Event, the Issues Raised by the Petitioners, Concerning These Plan-Development Provisions, Are Neither Properly Before, Nor Ripe for Review by This Court.

a. The petitioners' challenge to the plan-development provisions of Paragraph 12 (a), (b) and (c) of the district court's May 21, 1980 remedial order is both premature and ill-founded. 491 F.Supp. 353. The provisions of Paragraph 12 focus largely on voluntary, cooperative efforts to alleviate the lingering effects of state-imposed segregation within the St. Louis schools.

Specifically, paragraph 12(a) requires development and implementation of "a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which will also insure that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353.

The petitioners' claim is that the relief required thereunder is barred by *Bradley* v. *Milliken, (Milliken I)*, 418 U.S. 717 (1974), because there has been no finding of a constitutional violation against any suburban district.[12]

U.S. 963 (1975); *also see, U.S.* v. *Board of School Commissioners of Indianapolis*, 456 F.Supp. 183 (S.D. Ind. 1978), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 49 U.S.L.W. 3247 (October 7, 1980), *Evans* v. *Buchanan*, 447 F.Supp. 982 (D. Del.), *aff'd*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, 446 U.S. 923, *reh. denied*, 447 U.S. 916 (1980); *U.S.* v. *State of Missouri*, 363 F.Supp. 739 (E.D. Mo., 1973), *aff'd in relevant part*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

[12] As noted in the text above, the district court acknowledged the absence of any suburban district in the litigation. Moreover, the district court has subsequently issued a protective order direct-

This argument entirely misconstrues the scope and character of the paragraph 12 relief.

Unlike *Milliken I*, paragraph 12(a) of the district court's remedial order does not contemplate the mandatory involvement in remedial efforts of any suburban district or, indeed, of any student. The provision requiring the development of voluntary, interdistrict pupil exchanges, is directed solely to the petitioners, and "will not necessarily entail coercion of uninvolved governmental units because [the state] has the authority to operate outside the [St. Louis] city limits." *Hills* v. *Gautreaux*, 425 U.S. 284, 298 (1976). The nature and extent of the relief ordered pursuant to paragraph 12(a) is not distinguishable from that ordered in *Gautreaux*. In *Gautreaux*, the Department of Housing and Urban Development was a proven constitutional violator. Here, it is the state. In *Gautreaux*, HUD was directed to participate in a remedy within the limits of its jurisdiction which extended beyond the City of Chicago. Here, the petitioners have been directed to participate in a remedy designed to do no more than cure the effects of intradistrict violations within the limits of their jurisdiction which unquestionably extends beyond the city limits of St. Louis.

It is undisputed that the vestiges of over a century of state-imposed, statewide segregation have not been eradicated in St. Louis. Paragraph 12(a)'s requirement that the petitioners "make every feasible effort to work out with the appropriate [suburban] school districts . . . a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St.

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ing that the participation of any suburban district in any voluntary interdistrict plan of desegregation pursuant to paragraph 12, would not waive the rights of such party to resist or defend against any order or claim against it for mandatory participation. Motions to amend the complaint to add parties have been filed by the St. Louis Board and Caldwell plaintiffs, but have not been ruled upon.

Louis . . ." violates none of the principles of either *Milliken I* or *Gautreaux*. The provision is directed at the *state's* unremedied violation. Moreover, it is consistent with this Court's requirement that "all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971), *quoted in*, *Hills* v. *Gautreaux*, 425 U.S. at 297. The district court has the power to order a voluntary plan.

Such provision are standard. Under paragraph 12(a), any suburban district that the state cannot compel to participate in refusing segregative interdistrict transfers from St. Louis can be enjoined to do so by the district court entirely without regard to whether there has been an interdistrict violation. The provision is consistent with a court's "duty . . . to grant appropriate relief." *Hills* v. *Gautreaux*, 425 U.S. at 297.

Paragraph 12(b) contemplated a merger or consolidation of the separate vocational programs operated by the St. Louis Board of Education, and St. Louis County. Subsequently, a number of the parties agreed to a plan for the desegregation (but not merger or consolidation) of these programs, and the district court approved this settlement in a June 11, 1981 order. Pet. A-65. The petitioners, of course, may appeal the June 11, 1981 order, but the proper forum is the court of appeals, not this Court.

Paragraph 12(c) requires petitioners to develop a "suggested" interdistrict plan "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." Such a plan concededly cannot be ordered into effect in the absence of affected suburban districts and the adjudication of an interdistrict constitutional violation. As the petitioners note, the filing dates required pursuant to the provision have been temporarily suspended and reporting dates have been terminated. Thus, the issue itself is not even ripe for review at this time.

CONCLUSION

For all of the reasons herein, respondents respectfully submit that the petition for certiorari be denied by this Court.

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No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

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BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL.

Petitioners State of Missouri, and certain state officers (hereinafter "Petitioners" or "State Defendants"), have asked this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 3, 1980, *Adams* v. *United States*, 620 F.2d 1277, as well as the judgment and opinion of the Eighth Circuit entered on February 13, 1981, *Liddell* v. *Board of Education*.[1] Respondents The Board of Education of the City of St. Louis, Missouri, its Board members, officers and top administrators (hereinafter "City Board")—who were co-defendants with Petitioners below—urge this Court to deny the instant Petition.

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[1] This opinion is reprinted at page 1 of the Appendix ("App.") to the instant Petition for a Writ of Certiorari ("Pet.").

STATEMENT OF THE CASE

In its decision of March 3, 1980, the Court of Appeals held that both the State Defendants and the City Board had failed to meet their constitutional duty to dismantle the pre-1954 *de jure* racially dual school system in the City of St. Louis.[2] Relying on *Green* v. *County School Board*, 391 U.S. 430 (1968), the Eighth Circuit determined that the establishment of a neighborhood attendance policy after 1954 did not fulfill the defendants' "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" and that no such steps had been undertaken (620 F.2d at 1285-86). The Eighth Circuit also found that, as in *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979), the foreseeability of segregative consequences warranted an inference of segregative intent.

The Eighth Circuit ordered the District Court to adopt a city-wide plan of mandatory student transfers in conformity with the specific directions provided in the Opinion. The appellate court expressly recognized, however, that due to the demographics of St. Louis,[3] a substantial number of black public school students in the City would remain in one-race schools even after implementation of the transfer plan. Thus, the appellate court also ordered the trial judge to consider other techniques to help reduce segregation in those schools which would remain all-black even after the desegregation plan took effect, including voluntary student exchanges with suburban school districts. *Adams* v. *United States*, *supra*, 620 F.2d at 1296-97.

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[2] For an historical summary of this case, see Adams v. United States, 620 F.2d 1277, 1281-84 (8th Cir.) (en banc), *cert. denied*, 101 S. Ct. 88 (1980).

[3] As of March 13, 1981, there were 60,438 students enrolled in the St. Louis public school system, of whom 47,684 (or 79%) were black.

Neither the State Defendants nor the City Board filed a petition for a writ of certiorari from this 1980 Eighth Circuit decision. Only plaintiffs-intervenors Adams, *et al.*, a white parent group, sought review in this Court, on some of the same grounds relied upon by the State here. Their petition was denied. *Adams* v. *United States*, 101 S. Ct. 88 (1980).

On remand, after a hearing and in conformity with the mandate, the District Court entered findings of fact and conclusions of law, holding, *inter alia*, that the State of Missouri was a "primary constitutional violator," since it had required, and failed to dismantle, the *de jure* dual school system maintained under color of state law prior to 1954. Accordingly, the State was ordered to pay one-half of the total costs of implementing the comprehensive city-wide desegregation plan proposed by the City Board and approved by the District Court.

The desegregation plan was placed into effect at the beginning of the 1980-81 school year, as required by the appellate court. The transition to the new configuration and other educational requirements of the plan was accomplished without any significant incident. Many thousands of students were integrated in schools located throughout the City and over 36% of the teachers and principals were reassigned to provide the required staff balance. Year-end reports were favorable and encouraging for the future.

Since the Eighth Circuit had directed the District Court to consider further relief for the students remaining in unavoidably segregative conditions—indeed, the District Court's desegregation plan leaves 30,000 of the City's 60,000 public school students still attending one-race schools—the District Court in paragraph 12 of its May 21, 1980, Order directed the State Defendants, the United States and the City Board to develop proposed interdistrict solutions primarily on a voluntary basis. Para-

graph 12(a) of the District Court's May 21 Order, as amended by later orders,[4] directed the State Defendants, the United States and the City Board to develop "a voluntary, cooperative plan of pupil exchange" between the St. Louis school district and the surrounding suburban school districts. Paragraph 12(b) required development of a proposed plan for consolidation or merger and full desegregation of the separate vocational education programs operated by the City Board and the Special School District of St. Louis County. Paragraph 12(c), as amended, required development of a "feasibility plan" for interdistrict school desegregation.

The State Defendants appealed the May 21, 1980, Order and sought a stay pending appeal. This and all other stay requests subsequently filed by the State Defendants were consistently denied by the lower courts, by both Justice Blackmun and Justice Rehnquist, and finally by the whole Court on April 20, 1981.[5]

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[4] The full text of paragraph 12(a)-(c) of the May 21, 1980, Order, as amended, is set forth at Appendix A to this Brief.

[5] *See* Liddell v. Board of Education, 491 F. Supp. 351, 355 (E.D. Mo. 1980) (statement that no stay of the May 21, 1980, Order will be granted); Liddell v. Board of Education, No. 72-100C(4) (E.D. Mo., Feb. 26, 1981) (denial of a stay of the requirement that the State prepare a voluntary interdistrict plan); Adams v. United States, No. 80-1458 (8th Cir., Aug. 15, 1980) (denial of a stay of Paragraphs 12(a), (b) and (c) and other portions of the May 21 Order); Liddell v. Board of Education, No. 80-1458, slip op. at 20 (8th Cir., Feb. 13, 1981) (Pet. App. A-16) (denial of a stay of the December 19, 1980, order, requiring that the State prepare a new voluntary interdistrict plan); Liddell v. Board of Education, No. 80-1458, slip op. at 12-17 (8th Cir., March 19, 1981) (Pet. App. A-33-38) (denial of a stay of Paragraphs 12(a), (b) and (c)); Board of Education v. Liddell, No. A-200 (Blackmun and Rehnquist, Circuit Justices, Sept. 2, 9, 1980) (denial of a stay of all portions of the May 21, 1980, Order); State of Missouri v. Board of Education, No. A-285 (U.S., April 20, 1981) (denial of a stay of Paragraphs 12(a), (b) and (c)).

On February 13, 1981, the Court of Appeals affirmed the District Court's May 21, 1980, Order. Pet. App. A-1-24. In rejecting the State Defendants' contentions regarding paragraph 12, the Court of Appeals held, *inter alia*, that the voluntary pupil exchanges contemplated by paragraph 12(a) are a "valid part of the attempt to fashion a workable remedy within the City." Pet. App. A-15. The Court of Appeals found "ample support in the record" for the District Court's conclusion that the State Defendants were "primary constitutional wrongdoers" responsible for the unlawful segregation of the schools within the City of St. Louis. Pet. App. A-23.

On March 19, 1981, the Court of Appeals denied a petition for rehearing and also denied the State Defendants' renewed motion for a stay of paragraph 12. Pet. App. A-38. As noted above, this Court also denied the State Defendants' renewed stay application. *State of Missouri* v. *Board of Education*, No. A-825 (U.S., April 20, 1981).

Proceedings have therefore continued in the District Court. Hearings were held throughout May and June on the proposed plans submitted by the parties as well as other matters concerning the ongoing desegregation plan presently in operation within St. Louis. On May 21, 1981, the court approved, subject to any party's objections, a consent decree under paragraph 12(b) providing for the desegregation of City and county vocational programs, with directions for the necessary funding. Pet. App. A-65-93. After further proceedings, on June 11, 1981, the District Court ordered a vocational plan to be implemented.

On July 2, 1981, the District Court entered an Order implementing paragraph 12(a), which provides the framework and procedures for voluntary exchanges between the City schools and the school districts in three

surrounding counties. As provided by paragraph 12(a), the plan is purely voluntary and no school district or student is required to participate. Instead, the school districts and students are encouraged to do so through a combination of fiscal, educational and other incentives.

After having first suspended reporting requirements under paragraph 12(c), the District Court on June 23, 1981, terminated any further reporting obligations of any party pursuant to paragraph 12(c). A copy of that order is attached hereto as Appendix B.

SUMMARY OF ARGUMENT

Petitioners here seek review of two basic issues: first, whether the Eighth Circuit erred in concluding that the State Defendants and the City Board should be held liable for failing to dismantle their formerly *de jure* racially dual school system (Pet. 5-20); and, second, whether the provisions of paragraph 12 of the District Court's May 21, 1980, Order, affirmed by the Eighth Circuit on February 13, 1981, somehow violate the requirements of *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*), or of the due process clause of the United States Constitution (Pet. 20-30).

The City Board submits that Petitioners have failed completely to show that the decisions below conflict with any ruling from another Circuit or from this Court, or that they otherwise raise any issue warranting review here. Moreover, the City Board respectfully submits that it might seriously disrupt the education program of the City schools if the Court were now to grant review with regard to the propriety of the City of St. Louis desegregation remedial plan, which has been fully and effectively in operation since September, 1980. Finally, all of Petitioners' contentions with regard to paragraph 12 of the District Court's May 21, 1980, Order are not only

meritless, but are also untimely. These provisions of the Order merely call on Petitioners, as well as the City Board, to draft and submit to the District Court certain proposed plans; they neither impose any obligations—other than the drafting of a plan—on anyone, nor do they contemplate the possibility of any mandatory interdistrict relief. If Petitioners are not satisfied with the District Court's orders entered pursuant to paragraph 12(a) on July 2, 1981, and pursuant to paragraph 12 (b) on June 11, 1981, their appropriate course of action is to seek review of those orders by the Eighth Circuit. With respect to paragraph 12(c), this petition is moot because the District Court has suspended all reporting requirements under paragraph 12(c).

REASONS FOR DENYING THE WRIT

1. Petitioners contend that the Eighth Circuit's 1980 liability holding failed to analyze properly the statistical and other evidence regarding post-1954 demographic shifts in St. Louis. Petitioners argue that as a result the court improperly held that the State Defendants and the City Board failed to meet their constitutional duty to dismantle the pre-1954 state-mandated *de jure* system of school segregation in St. Louis. Petitioners offer no reason why this essentially fact-oriented question merits review here. Furthermore, Petitioners' contentions are not meritorious.

Prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Constitution and statutes of the State of Missouri mandated a system of racial segregation in all the State's public schools. *See Adams* v. *United States*, *supra*, 620 F.2d at 1280. Under those circumstances, it is well settled that the State, as well as the City Board, had an affirmative obligation after 1954 to dismantle the City's formerly dual school system. *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958); *United*

States v. *Missouri*, 363 F. Supp. 739, 747 (E.D. Mo. 1973), *aff'd in part, rev'd in part on other grounds*, 515 F.2d 1365 (8th Cir.), *cert. denied sub nom. Ferguson Reorganized School District* v. *United States*, 423 U.S. 951 (1975). When a state has failed to meet its constitutional responsibility in this regard, the courts will impose on the state the duties, and the attendant costs, necessary to remedy the constitutional violation. *See, e.g., Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*).

Petitioners do not challenge these legal standards. Instead, they argue that the Court of Appeals drew the wrong inferences from certain statistical and demographic evidence, and they contend that the State had removed all legal impediments to dismantling the dual school system (Pet. 5-20). A review of the Court of Appeals' opinion, however, demonstrates that the record provides ample support for the court's conclusions on these issues.

Moreover, Petitioners have failed even to suggest that the Eighth Circuit "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." *See* Rule 17.1(a), Sup. Ct. Rules. Neither have Petitioners demonstrated that the decision below is inconsistent with any decision of this Court, or otherwise presents an important or novel question of law. *See id.* at Rule 17.1(a)-(c). Petitioners' challenge to the Court of Appeals' conclusions on liability do not raise issues worthy of review by this Court on a writ of certiorari.

2. Another factor militating against this Court's exercise of its discretion to grant review of the liability issues here relates to the unusual timing of this Petition.[6]

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[6] Indeed, it is not even clear whether the instant Petition is jurisdictionally timely to the extent that it seeks review of the Court of Appeals' 1980 liability determination, which was reached

The Court of Appeals issued its decision, finding Petitioners (and Respondent City Board) liable on March 3, 1980. On October 6, 1980, this Court denied a petition for a writ of certiorari to review that decision. 101 S. Ct. 88 (1980).[7] Following remand from the Eighth Circuit, the District Court on May 21, 1980, entered its remedial order calling for a desegregation plan to be implemented in time for the September, 1980, opening of the new school year. The State Defendants repeatedly sought a stay of that order from the District Court, the Court of Appeals, two Justices of this Court, and the full Court, but such a stay was consistently denied.[8]

Respondent City Board has worked tirelessly since the District Court's May 21, 1980, Order to make the court-ordered desegregation plan work. The City Board called upon parents, teachers, students—indeed, the whole community—to cooperate in seeking to avoid the problems that have accompanied court-ordered desegregation in some other cities. This cooperative effort has proven remarkably successful. The City of St. Louis has just completed its first full school year operating under a court-ordered desegregation plan, and no significant incidents or difficulties marred the smooth implementation of the plan.

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after trial of both liability and remedy issues. *See* Adams v. United States, *supra*, 620 F.2d at 1283. *Compare* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923), *with* Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916); Mercer v. Theriot, 377 U.S. 152 (1964). Petitioners' explanation for their failure to seek review of the 1980 decision—the "obscure nature" of that opinion, Pet. 15—is totally without merit.

[7] That petition was filed by plaintiffs-intervenors Adams, *et al.*, and not by the State Defendants. The Adams Petition, however, raised essentially the same issues as those raised in Sections I and II of the instant Petition.

[8] *See* note 5, *supra*.

The City Board—which was a co-defendant with Petitioners below—urges this Court not to grant further review at this time with regard to this fully operational desegregation plan. The grant of a writ of certiorari now would simply resurrect and exacerbate all the doubts and concerns that the community long since put behind it in uniting to make the court-ordered plan work for the City's school children. We submit that under these circumstances the Court should not exercise its discretion to grant further review.

3. The issues raised by Petitioners with regard to sub-paragraphs (a), (b) and (c) of paragraph 12 of the District Court's May 21, 1980, Order reflect a misunderstanding of that order, are totally premature,[9] and in any event present no issue worthy of review by this Court.

a. Petitioners argue that paragraph 12(a) constitutes an "interdistrict" order, and thus violates *Milliken I*, since the lower courts to date have found no interdistrict constitutional violation.[10] *See* Pet. 20-24. Petitioners

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[9] There is also substantial doubt about whether a jurisdictional basis exists for Petitioners' appeal of paragraph 12 of the order, since it was wholly interlocutory and no request for certification pursuant to 28 U.S.C. § 1292 was ever made. *See* Bradley v. Milliken, 468 F.2d 902, 903 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972); Taylor v. Board of Education, 288 F.2d 600, 603 (2nd Cir. 1961). *Compare* Liddell v. State of Missouri, No. 80-1458, slip op. at 18 n.5 (8th Cir., Feb. 13, 1981) (Pet. App. A-14 n.5).

[10] The City Board and plaintiffs Caldwell, *et al.* ("NAACP") have filed motions in the district court seeking leave to file amended pleadings adding suburban school districts as parties, alleging interdistrict constitutional violations, and seeking mandatory interdistrict relief. All parties to this case agree that no such relief would be proper absent a finding of an interdistrict violation, or an intradistrict violation with interdistrict effects, as required by *Milliken I*.

have misconstrued paragraph 12(a). It does not direct or suggest any mandatory interdistrict desegregation.

Paragraph 12(a) provides that the State Defendants, the City Board, and the United States shall undertake "every feasible effort" to develop a "voluntary, cooperative plan of pupil exchange which will assist in alleviating the school segregation in the City of St. Louis," to determine which county school districts are willing to participate in the plan, and to submit such a plan to the court for its consideration. The District Court has not ordered, and paragraph 12(a) does not contemplate, a plan of involuntary participation by county school districts, or by school children anywhere. As stated by the Eighth Circuit in its February 13, 1981, decision (Pet. App. A-15), "Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up." Thus, the State Defendants have no basis for contending that they are now being ordered to prepare a mandatory interdistrict remedy.

Indeed, there is nothing in the paragraph 12(a) plan entered by the District Court on July 2, 1981, which requires the interdistrict transfer of students. The court characterized the plan as "voluntary in philosophy and fact." [11] Neither students nor school districts are

---

[11] The court's July 2, 1981, Order provides (p. 7):

> These general characteristics apply to all of the following elements of the plan:
>
> A. The plan is voluntary in philosophy and fact. This point is central to this plan and distinguishes it from other alternatives. The word "voluntary" as used throughout should be understood in its usually accepted sense, specifically:
>
> No students would be required to attend any schools but those to which they would normally be assigned. The plan presents additional options and incentives for students, parents, and school districts. Every decision concerning the choice

required to participate. School districts and students alike are encouraged to participate through a combination of fiscal incentives, magnet schools and other specialized programs. The Order imposes no obligations on school districts which do not participate or on their students. Suburban school districts were asked to notify the Court by August 6 whether they wished to participate. As of that date, no suburban district had unconditionally agreed to participate in the paragraph 12(a) plan.[12]

If the State Defendants are not satisfied with the July 2 Order, then they of course have the right to seek review of that Order. Paragraph 12(a) of the May 21, 1980, Order, however, imposed no obligations on Petitioners other than the requirement that they draft a proposed plan. Thus, at this stage, and in this Court, Petitioners' challenges to paragraph 12(a) are entirely premature,[13] and do not warrant review.

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of schools and districts other than students' home schools and districts would be made by students and their parents.

Participation in this plan is neither an admission of liability nor an element of proof of liability of any suburban school district in an inter-district school desegregation case.

A school district's participation in this plan would be voluntary. Each school district in the St. Louis metropolitan area is encouraged to make its own independent decision whether to participate in the plan.

[12] Of the 39 suburban school districts eligible to participate in the paragraph 12(a) plan, 33 have decided not to do so, and two have stated they will not respond until after this Court's ruling on the instant Petition. Four districts—Kirkwood, Clayton, University City, and Ritenour—have stated they would agree to participate, but only if substantial revisions are made in the plan. Only the City Board has agreed to participate unconditionally.

[13] Similarly, the *amici curiae* briefs filed herein by certain suburban school districts assume that the District Court is planning somehow to force suburban districts or students to participate in a paragraph 12(a) plan. There is simply no basis for such an assumption: the language of paragraph 12(a) does not support

The State Defendants argue (Pet. 21) that the paragraph 12(a) plans contemplated by the District Court are not voluntary as to them. However, it is entirely within the power of the District Court in this case to order the State Defendants to prepare and fund a plan for *voluntary* interdistrict pupil transfers as a supplement to the other features of the intradistrict remedy. The State Defendants have already been adjudicated to be primary constitutional violators who have failed to fulfill their constitutional obligations to dismantle the racially dual structure of public schools in St. Louis. Thirty thousand City school children continue to attend one-race public schools today as a result of this constitutional violation. The State Defendants cannot complain when they are ordered to prepare a voluntary plan which, it is hoped, will give at least some of those children an opportunity to exercise their right to an education free from the effects of segregation for which the State has been held to be primarily responsible.

This Court has recognized that *Milliken I* does not protect a constitutional violator from being ordered to implement a remedial plan which extends beyond the city in which the violation occurred, so long as suburban districts or other nonparties are not ordered against their will to participate in the plan. *Hills v. Gautreaux*, 425 U.S. 284, 297-300 (1976). In *Gautreaux* this Court rejected HUD's contention that because its constitutional violation (racial discrimination in the siting of public housing) occurred in the City of Chicago, *Milliken I* precluded an order against HUD which would affect its conduct in the greater metropolitan area. 425 U.S. at

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it; the District Court's July 2 plan is entirely voluntary; and the City Board agrees that suburban districts cannot be required to participate in any interdistrict remedy unless they are made parties to a case that meets the standards set forth in *Milliken I*. *See also* the District Court's Conclusions of Law of June 3, 1980, discussed at note 16, *infra*.

297. This Court found that such relief was well within the broad equitable power of a federal court to correct a violation of the federal constitution. Thus, the plan contemplated by paragraph 12(a) is supported by *Gautreaux*. At the moment, however, no such remedial plan is before this Court for review.

b. Petitioners' challenge to paragraph 12(b) of the Order is also premature. The District Court found, *inter alia*, that the State Defendants had violated the Constitution by failing to take effective measures to disestablish the dual system of vocational education existing in the City and in St. Louis County. This finding underlies paragraph 12(b), which, as amended, required the State Defendants, the City Board, and the United States to develop and submit a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special School District of St. Louis County and the City Board.

Recent developments, however, have made irrelevant Petitioners' contentions regarding the paragraph 12(b) requirement that defendants submit a vocational education desegregation plan. All concerned parties,[14] including the State Defendants, joined in submitting a proposed consent decree which provides for a mutually acceptable plan, although the State Defendants reserved their right to challenge the funding provisions for the implementation of the plan. As a result of this agreement, the District Court on June 11, 1981, issued an order providing for desegregation of the vocational education programs. Pet. App. A-65.

The merits (and the record) of that June 11 order are not before this Court, and thus Petitioners' contentions

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[14] The Adams plaintiffs-intervenors, who would not be affected by any paragraph 12(b) plan, did not join the proposed consent order.

as to paragraph 12(b) are irrelevant. Any challenge now in this Court regarding the propriety of the June 11 order that resulted from the paragraph 12(b) process is premature.

c. Petitioners also challenge paragraph 12(c) of the District Court's May 21, 1980, Order. Paragraph 12(c), as amended, had called on the State Defendants, the City Board and the United States to develop and submit a "feasibility plan" for interdistrict desegregation.[15] The order neither called for nor contemplated[16] implementation of such a plan prior to further evidentiary proceedings.[17]

As Petitioners note (Pet. at 28), on April 1, 1981, the District Court suspended all further requirements under paragraph 12(c). Even more important, on June 23, 1981, the District Court granted the February 27 motion of the NAACP to *terminate* all further reporting re-

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[15] The language quoted above reflects the court order of September 17, 1980, amending paragraph 12(c). Pet. App. A-41. Petitioners and the *amici* choose to ignore the amendment and instead rely on the language which was superseded by the amendment. *See* Pet. 4, 28, 29. Thus, all the arguments which Petitioners present on such superseded terminology as "vestiges" (*see* Pet. 28-30) are irrelevant.

[16] In its Conclusions of Law issued June 3, 1980, the District Court stated that no suburban district "can be ordered to participate until its rights have been adjudicated." Liddell v. Board of Education, *supra*, 491 F. Supp. at 359. Elaborating on this point, the judge in a letter to all parties dated September 5, 1980, made it clear that county school districts would not be ordered to participate in any desegregation remedy unless and until they had been made parties to the litigation and afforded a "full opportunity for a hearing and appeal." (A copy of the Court's letter is attached as Appendix C.)

[17] As noted above, the City Board and the NAACP have filed motions seeking leave to file pleadings alleging interdistrict constitutional violations which, if proven, would satisfy the standards set forth in *Milliken I*. *See* note 10, *supra*.

quirements under paragraph 12(c). *See* Appendix B. Thus, Petitioners' arguments with regard to paragraph 12(c) of the May 21 Order were meritless in the first instance and are now totally moot.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

The full text of paragraph 12(a)-(c) of the District Court's May 21, 1980 order, as amended, is as follows:

12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchange which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by December 15, 1980.

The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts shall be the study of the

feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those

that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by December 15, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibiiity plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

APPENDIX B

H (203) 81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, *et al.*,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

This matter is before the Court on the parties' separate motions related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended. To expedite ongoing efforts to design a voluntary, cooperative desegregation plan in compliance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that the motion to Terminate Further Reporting Under Paragraph 12(c) filed by Caldwell plaintiffs-intervenors on February 27, 1981, H(8)81, be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the post hearing motion to terminate 12(a) hearing and to commence 12(c) proceedings filed by Liddell plaintiffs, H(155)81, be and the same is denied.

This Court retains jurisdiction of this matter for all purposes, including entry of such additional orders as may, from time to time, be necessary and proper related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended.

Dated this 23rd day of June, 1981.

/s/ William L. Hungate
United States District Judge

APPENDIX C

James H. Meredith
Senior Judge

425-4217
Area Code 314
FTS 279-4217

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
U.S. Court House and Custom House
St. Louis, Missouri 63101

September 5, 1980

TO: All Counsel of Record
Dr. Robert Wentz
Dr. Gary Orfield
Mr. Edward T. Foote

RE: Liddell et al., v.
Board of Education Of The City
of St. Louis, et al
USDC ED MO No. 72-100-C (C)

Gentlemen:

For the purpose of clarifying paragraphs 12(b), (c) and (d), it is requested that all counsel meet on Friday, September 12, 1980, at the office of Paul Rava, at 1:00 p.m., and with the Court in Chambers at 3:00 p.m., in order that we may have a mutual understanding about how we should proceed.

It is the Court's view that we should make every effort to have voluntary cooperation with all of the districts in St. Louis County before they are made parties and before we proceed on a involuntary plan.

Secondly, I see no reason why this Court should be burdened with reports from the United States and School Board indicating who may or may not be violating the

law and making them possible defendants. I have no objection to the Government, the State, or the School Board proceeding with their investigations but I do not think it is a matter to be reported to the Court until such time that the school districts may be joined and each district has an opportunity to defend themselves. Neither do I think we should take in any district involuntarily without them being made parties and without a full opportunity for a hearing and appeal.

Some thought should also be given to how we can eliminate a district from a involuntary plan in the event it cooperates in an adequate manner. What legal steps should be required to assure that district will not be brought into later litigation.

In addition to the discussion we have had concerning paragraph 12(b), (c), and (d) of the May 21st order, it strikes me as unreasonable that the State of Missouri by regulation has reduced the 80% transportation of children, as set out in the Statute, to less than 25% by regulation. I would like some further thought and discussion about that matter.

I am looking forward to seeing all of you on Friday, September 12, 1980.

Sincerely,

/s/ James H. Meredith
JAMES H. MEREDITH

JHM:js

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition of Respondents Board of Education of the City of St. Louis, *et al.*, were mailed, postage prepaid, this 17th day of August, 1981 to:

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NO. 80-2152

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RECEIVED
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SUPREME COURT, U.S.

STATE OF MISSOURI, ET AL.,

PETITIONERS

V.

CRATON LIDDELL, ET AL.,

AND

EARLINE CALDWELL, ET AL.,

AND

JANICE ADAMS, ET AL

AND

BOARD OF EDUCATION OF THE
CITY OF ST. LOUIS, ET AL.,

AND

THE CITY OF ST. LOUIS, MISSOURI

AND

THE UNITED STATES OF AMERICA

RESPONDENTS

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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BOARD OF EDUCATION OF THE
CITY OF ST. LOUIS, ET AL.,

AND

THE CITY OF ST. LOUIS, MISSOURI

AND

THE UNITED STATES OF AMERICA

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, State of Missouri, have asked this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 3, 1980, Adams vs. United States, 620 F. 2d 1277 (8th Circuit 1980), and the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered February 13, 1981, Liddell, et al., vs. Board of Education of the City of St. Louis, et al, 80-1458 - 80-1494 - 80-1531 - 80-1599 and 80-1735. No appeal was taken of the judgment and opinion handed down by the Court of Appeals on March 3, 1980, Adams vs. United States, supra. Petitioners' Application for stay of the judgment and opinion handed down by the Eighth Circuit Court of Appeals February, 1981, Liddell, et al., vs. Board of Education, et al., supra, was denied.

Respondents, Craton, et al., respectfully urge this Court to deny the present petition.

STATEMENT OF THE CASE

This case was instituted in February, 1972 by Craton Liddell, et al., respondents, herein on behalf of himself and all black children of school age within the City of St. Louis, Missouri. Respondents alleged that the Board of Education of the City of St. Louis, Missouri operated a school system which was in violation of the Fourteenth Amendment.

During the nine and one-half years of this litigation, six additional parties were added: Earline Caldwell, et al, by intervention, Liddell, et al vs. Caldwell, et al,, 546 F 2d (8th Circuit 1976). Plaintiffs-Intervenors, City of St. Louis, Missouri, Janice Adams, et al., and the United States of America by their motion. On motion of Intervenors Caldwell, et al., others and the United States, the State of Missouri, The State Board of Education and the Commissioner of Education were made Defendants by the District Court's order of July 13, 1977. (See Appendix A)

All parties were bound by the pleadings, stipulation of facts and the consent decree (District Court Order, July 13, 1977). Despite its ruling that all parties were bound by the stipulation of facts and consent decree, the Court ruled that a trial be had in order to determine the extent of the consitututional violation of Defendants, if any. Trial began October 17, 1977 and ended May 26, 1978. The State of Missouri was represented by counsel during the entire proceeding.

In 1979, the District Court rendered its finding and judgment; that there had been no intentional segregation of students by the actions or inactions of Defendants City Board of Education and State of Missouri and no consitutional violations, 469 F. Supp 1304. This was overturned by the Eighth Circuit Court en banc on March 3, 1980, Adams vs. United States, 620 F. 2d 1277 (8th Circuit 1980; cert. denied, 101 Sup. Ct. 88, 1980).

Petitioners, State of Missouri, et al, did not appeal the March 3, 1980 judgment and opinion of the Court of Appeals and did not appeal the actions of the District Court making them a party

on July 13, 1977. Nor did Petitioner, State of Missouri appeal the judgment and opinion of the District Court's findings of March, 1979 which absolved the state of liability.

Following remand by the Eighth Circuit overturning the District Court's findings the St. Louis Board of Education submitted its plan for desegregation of the school system. The District Court concluded that the State was a primary constitutional wrong-doer and directed the State to pay one-half of the costs of the desegregation plan. The State was represented by counsel throughout these hearings. Additionally, the Court directed the State of Missouri, City Board of Education and plaintiff-intervenor, the United States, to develop the following plans:

A - Voluntary cooperative pupil-exchange with the thirty-nine schools districts in St. Louis, Franklin and Jefferson Counties.

B - A plan for the consolidation and merger of the separate vocational education programs of the Special School District of St. Louis County and the City School Board.

C - A mandatory interdistrict desegregation plan to desegregate the over 30,000 black pupils in North St. Louis who remain in all segregated schools.

On appeal, this plan was affirmed by the Eighth Circuit Court of Appeals the State's petition for rehearing was denied. State's application for stay of the judgment to the Eighth Circuit Court of Appeals was denied. State's application for stay of mandate to Mr. Justice Blackmum was denied. (See Appendix B)

REASONS FOR DENYING THE WRIT

I.

The Eighth Circuit Court of Appeals Did Not Apply an Improper Standard in Determining the Effectiveness of a 1954 Desegregation Plan Espoused by the School Board of the City of St. Louis:

a. The plan did not rid the school system of the pre-1954 racial separation.

b. The population shifts within the city and school system were "managed" so as to continue the pre-1954 pattern of racial separation in the public school system.

c. The evidence corroborates that continuity.

There is no question that the State of Missouri was primarily responsible for racially segregated public schools in this State as this separation was mandated by the State Constitution and statutes, and is admitted by Petitioners in this application for this Court's writ, (Petition, P. 5). However, the inference that independently of court mandate the Board of Education of the City of St. Louis was preparing for implementation of a plan of desegregation inconsistent with the constitutional requirements of racial separation in the public schools is not accurate.

After Brown I, the St. Louis Board of Education on June 22, 1954 adopted a 2 year plan (for completion in 1956) for the assignment of all elementary students to neighborhood schools. Theoretically, race was not to be a consideration. This is true in theory only because in St. Louis residential neighborhoods had been constructed and "managed" in such a manner that they were racially identifiable with the part of the school district in which they were located. This neighborhood "management" was by public and private agencies with the efforts of the private agencies being enforced by the state and federal courts. These efforts were subsequently ruled constitutionally illegal so that it was the assignment of students to schools based on a constitutionally illegal mechanism that the Eighth Circuit Court of Appeals struck down a plan which did not remedy (but mantained in pace) the state's constitutionally mandated racially dual school system. Further the Eighth Circuit reaffirmed that the elimination of overt racial indentification in student assignment alone was not sufficient in and of itself and that student assignments based on illegal means were illegal also,

Petitioner, State of Missouri talked about "demographic change" which took place within the school district (Petition P. 7) as if this change resulted in a resegregation of the system. The Eighth Circuit was aware that the population movements were controlled by enforced private agreements and by governmental instrumentalities and agencies (state and federal). The instrumentalities and agencies included school districts,state and federal courts, restrictive covenants, real estated Boards, real estate Bankers Association, F.H.A., H.U.D., Veterans Administration, and others. The result was that what was known as South St. Louis and (Far) North St. Louis remained

white and middle St. Louis remained black. The Board or the State of Missouri attempted no method of students assignment other than by neighborhoods with variations to maintain the "black" or "white" characteristics of the schools. The School Board would "turn-over" whole formerly all white buildings to black children and if necessary bus in black children under the guise of "relieving over-crowding".

The St. Louis Board of Education having adopted a modified neighborhood policy in 1954, the State's claim that there is little or no evidence that pre-1954 all black schools remained so and that pre-1954 all white schools in South St. Louis remained so is not well founded. However, there is no evidence (documentary or otherwise) that a black neighborhood or school in 1954 ever changed to all white or predominantly white at anytime after 1954. Further, there is no evidence that pre-1954 all white schools in South St. Louis had a significant number of walk-in black students at anytime after 1954; and what black students they did have were bused in "to relieve over-crowding" in black schools and to keep the buildings open for the white neighborhood children.

The State of Missouri claims (Petition P. 7) that to use 1962 statistics "presumes a continuity of the racial composition of the schools in question". This statement ignores the testimony of Dr. Ernest Jones, Deputy Superintendent and Dr. Julius Dix, an area Superintendent (both products of the St. Louis school systesm as students, teachers, principals and administrators) that certain of the pre-1954 black or white schools during the period 1954 - 1962 did not change their racial charactertitics. See testimony of Dr. J. Dix, Tr. pp. 2437-2440; pp. 2450-2465, Testimony of Dr. Ernest Jones, Tr. pp. 1496-1505.

Further, the State of Missouri (Petition P. 11-12) state that the Eighth Circuit Court of Appeals in 1976 (546 F. 2d 768, 772) assumed "prior to any trial on the merits that the St. Louis school system was not unitary". The Court of Appeals was interpreting a detailed agreed statement of facts which was the basis of the consent decree entered at that time (Liddell vs. Caldwell, 546 F. 2d. 768 (1976) and that conclusion was not based on assumptions.

II.

The Court of Appeals' Finding of Liability Against The State of Misouri Is Not Erroneous As Being:

a. Contrary to Due Process;

b. Vague and Incomprehensiable; and

c. The leval of finding does not exceed the level of premissible relief available.

The State of Missouri complains that it nor its officers were named defenddants at the time the suit was originally filed. The school district was sued in its offical capacity as an instrumentality of the State of Missour created and operating pursuant to authority granted by the State of Missouri in the exercise of the state function to provide a public education to children between certain ages. For failure to perform properly those granted functions the State by statute authorized suit directly against the school district as an instumentality of the state. Beacause this law

suit could convict the school district as an instumentality of the State of improperly performing certain state functions, the District Court ordered the State of Missouri and certain officially joined as party defendants. (See Resp. Liddell, App. A.) They were promptly notified and the State of Missouri, et al. were represented thereafter by the Attorney General of the State of Missouri. Whether the pleadings needed amending or should have been amended to assert against the State directly the claims asserted against its instrumentalitiy in the exercise of state granted functions was never raised by the State of Missouri and all proceedings were fully participated in by the State without complaint as long as the State of Missouri assumed that matters involved were going according to its liking.

We submit that Petitioner, State of Missouri cannot now complain that it was made a party to this suit by the action of the District Court. The State never complained until it was ordered to pay money as part of the remedy. Seemingly, the State complains about the amount of payments, not the fact of payment. This is hardly a denial of due process.

The Liddell Respondents believe that the holding of the Court of Appeals, Eighth Circuit, are clear and understandable.

In the Eighth Circuit opinion Adams vs. United States, 620 F. 2d. 1277, cert. denied, 101 S. Ct. 88 (1980) the appeals court noted that the District Court had determined that the various defendants (including the State of Missouri had done no constitutional wrongs "in the formation and perpetration of the admittedly segregated

St. Louis public school system". This determination of the District Court was reversed in the above March 3, 1980 opinion. (The various State defendants had been added in July 13, 1977) (Liddell Appendix A.) 620 F. 2d. 1277, 1283. In making the reversal, the Appeals Court recognized the State constitutional requirements for racially segregated schools and that actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area. id at 1291, 1294, note 27. The State of Missouri did not seek a review of these determinations. Only Adams sought a review and this Court denied certiorari, 101 S. Ct. 88 (1980).

After a hearing on the remedy the District Court found and held that the State defendants were the "primarily constitutional wrongdoers who have abdicated their affirmative remedial duty", concerning the segregated St. Louis public school system. Liddell vs. Board of Education, 491 F. Supp. 351, 259 (1980). On February 13, 1981, the Eighth Circuit Appeals Court affirmed, including the District Court's implementation. (Petitioner App. B, p. A-33-A34). See, also, Petitioner's App. A, p. A-1 Appeals Ct. Opinion of February 13, 1981.

As to the breath of the equitable powers of the court see Petitioners' App. E, P. A-60.

III.

The District Court Did Not Exceed Its Authority and Did Not Violate Due Process in Paragraphs 12 Of Its May 21, 1980 Order In Which It Required The Submission Of"...A Suggested Plan of Interdistrict School Desegregation, Necessary To Eradicate The Remaining Vestiges of Government Imposed Schools Segregation in The City of St. Louis and in St. Louis County

We believe that the District Court did not violate due process against the State of Missouri. It must be remembered that paragraph 12 a, b and c plans are designed to have the State of Missouri participate in correcting a constitutional wrong that the State of Missouri produced and helped perpetuate and which wrong is not constitutionally corrected as to more than 30,000 black students in North St. Louis by the plan approved by District Court and the Eighth Circuit Court of Appeals. Liddell Respondents submit that if anyone is harmed it is the black children in North St. Louis who have been retained in their pre-1954 conditions with no hope for the equal protection of the law. The State of Missouri has the power to relieve pre-1954 conditions for the black schools children of North St. Louis, if it saw fit to do so. That power is vested. (See Resp. Liddell - Appendix B)

However, 12 a and b are not problems. The districts have not seen for to volunteer; or they have consented to something which pleases them. Paragraph 12c is no problem because it has been suspended by the District Court. And, if not suspended would require a hearing.

Further, Liddell Respondents submit that the States reference to State constitutional restrictions (Petition, p. 27) is a misapplication of the law. The restriction is against "local or special law" and does not restrict the general legislative powers of the State of Missouri in setting or providing for the establishment of school districts. The power of legislative classification is the remedy. (Example: the City of St. Louis is the only school district denominated as a metropolitan schools district) School district are

creatures of the State of Missouri and can exercise only such powers as the State authorizes. It is up to the State to act.

CONCLUSION

The Liddell Respondents adopt by referencce and make a part hereof State Petitioners Appendices A through F; and attach hereto Liddell Respondents Appendices A and B and make a part hereof.

Further, for the reasons stated herein, the Application for the Writ of Certiorari to the Eighth Circuit Court of Appeals should be denied.

RESPECTFULLY SUBMITTED,

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Microfilmed

FILED
MAY 13 1977
WILLIAM D. RUND, Clerk
U. S. DISTRICT COURT
E. DISTRICT OF MO.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,

Plaintiffs,

and

EARLINE CALDWELL, A Minor, et al.,

Plaintiffs-Intervenors,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al.,

Defendants.

No. 72 C 100 (1)

ORDER

The motions of intervening plaintiffs and of amicus curiae, United States of America, Department of Justice, to require defendants to implement their plan of desegregation on or before September 1977 are denied. This Court had a meeting of counsel for all parties and all amicus curiae on April 21 and 22, 1977. At that meeting the defendant Board of Education made it clear that if their plan were to be put into effect in September 1977, it would be necessary to commit funds by May 1, 1977, to let contracts for renovation of certain schools by May 25, 1977, and to let contracts for transportation by June 14, 1977. The plan of desegregation advanced by the Board of Education of the City of St. Louis, Missouri, was opposed in writing or orally by the plaintiff intervenors, the plaintiffs, and all amicus curiae. The only part of the plan to which all parties agreed was the Magnet School Program. Accordingly, this Court entered its order setting out a date for hearing on July 25, 1977, with provisions for discovery by all parties on certain dates. Thereafter,

the plaintiffs, the plaintiff-intervenors, the United States, Department of Justice, Civil Rights Division, have all filed alternate plans. Other amicus curiae have also filed suggestions to oppose or modify the defendants' plan. The defendants are proceeding with the Magnet School Program.

On May 20, 1977, at a meeting of counsel, the intervening plaintiffs, the United States, Department of Justice, Civil Rights Division, reversed their positions and requested the Court to order the defendants to proceed. This was supplemented by written motion of intervening plaintiffs on May 23, 1977. In the due course of time, after an orderly hearing, the Court will make a decision. To order the defendants to proceed at this point would be a denial of due process to all parties concerned.

In the light of recent Supreme Court cases: Milliken v. Bradley, No. 76-447, decided June 27, 1977; Dayton Board of Education v. Brinkman, No. 76-539, decided June 27, 1977; and School District of Omaha v. United States, No. 76-705, decided June 29, 1977, it is necessary for this Court to determine if there has been a constitutional violation by the defendants. This determination has never been made by the consent decree nor the stipulation of facts, and the stipulation of facts denies any constitutional violation by defendants. All parties are bound by the stipulation of facts and the consent decree. The remedy to be adopted by the Court will depend on the nature and extent of the constituional violation, if any. These matters will be considered by the Court at the July 25, 1977, hearing in light of the evidence introduced and the briefs of the parties.

Defendants' motions to dismiss the plans proposed by the plaintiff, plaintiff intervenors, NAACP, and the Department of Justice,

Civil Rights Division, are denied. The plans will be considered by the Court along with other plans.

The motions of the City of St. Louis and Janice Adams, et al., to intervene and become parties plaintiff instead of amicus curiae be and are hereby granted.

The motion of amicus curiae Adams, et al., for a protective order to restrain plaintiffs, plaintiff-intervenors, and amicus curiae United States, Department of Justice, Civil Rights Dvision, from further discovery is denied.

The motions of defendants, plaintiff-intervenors, and United States, Department of Justice, Civil Rights Division, to add as additional parties-defendant the following: The State of Missouri, the Commissioner of Education of the State of Missouri, and The State of Missouri Board of Education, are granted and these parties-defendant are hereby added to this suit.

The motion of amicus curiae Adams, et al., to strike and dismiss is now moot and is denied.

Dated this 13th day of July, 1977.

James H. Meredith
United States District Judge

APPENDIX B

IN THE
SUPREME COURT OF THE UNITED STATES

NO. A-825

MISSOURI, et al.,

Petitioners,

v.

CRATON LIDDELL, et al.,

Respondents.

MEMORANDUM OF RESPONDENT CRATON LIDDELL, et al.,
CONCERNING APPLICATION FOR STAY OF MANDATE OF THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Pursuant to the request of Mr. Justice Blackmun, the Liddell, et al., Plaintiffs, inform him that the Liddell, et al., Plaintiffs, do oppose the application for stay of mandate requested by the State of Missouri in Liddell, et al. v. Board of Education of City of St. Louis, Missouri, Nos. 80-1458, 1494, 1531, 1549, and 1735 (8th Cir. 1981).

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The undersigned counsel certifies that the foregoing instrument was served upon the following counsel of record on this 8th day of April, 1981:

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MEMO IN SUPPORT OF PLAINTIFFS'
SUGGESTION OPPOSING STAY

Liddell, et al., the original Plaintiffs herein, oppose the stay of mandate requested by the State of Missouri, and further say to the Mr. Justice Blackmun that the resolution of the question of presenting a Constitutional plan of desegregation to the Court has been delayed much too long.

The issue of whether the plan implemented by the Board of Education in 1954-55 with the blessings of the State of Missouri met Constitutional requirements was decided against the Board of Education of St. Louis and its Co-Defendant, the State of Missouri by the Eighth Circuit Court of Appeals, March 3, 1980. Liddell, et al. v. Board of Education, et al.

The Eighth Circuit Court of Appeals ruled that the plan of the Board of Education of the City of St. Louis did not dismantle the pre-1954 dual system of segregated schools and that it was never done. This decision was not appealed by the Defendants, State of Missouri nor the City of St. Louis Board of Education.

The exclusive and ultimate responsibility for a public education in the State of Missouri is vested in the legislature of the State of Missouri.

Article IX Subsection 1(a) Mo. Constitution sets out:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law.

This law remained on the books until 1976 when, by special election, the provision as to separate schools for white children and colored children was removed from the Constitution, twenty-two years after Brown I and Brown II and 101 years after its enactment by the General Assembly in 1875.

Establishment and maintenance of the public school system is primarily the function of the State.

However, the State of Missouri would have you believe that it was not a party to this lawsuit and was not a Defendant against whom judgment was rendered.

The State of Missouri in its Suggested Memorandum points out in great detail that the Eighth Circuit Court of Appeals mandate was directed towards the City of St. Louis Board of Education, and that said Board is primarily responsible for the correction of the Constitutional violations which existed prior to Brown I and since Brown I to the present, and the corrections of these violations is the responsibility and duty of the City Board of Education.

These Plaintiffs hold that the State of Missouri has either misread or failed to understand mandate of the Eighth Circuit Court of Appeals or the Constitution of the State of Missouri.

The State of Missouri is a sovereign body in which is vested the ultimate responsibility of providing a Constitutional setting for the education for all students, black and white, which is devoid of the vestiges of segregations.

In State v. Andrae, 106 S.W.561 the Supreme Court of Missouri decided long ago that the State had the power and the duty to combine districts, expand districts and that there were no restrictions on the state legislature except the general limitations as to legislative action.

The Court further said: "The General Assembly establishes districts, provides for boards of directors, and county and city superintendents and under general law provides for local self-government in school matters."

It is the furthered opinion of these Plaintiffs that the State of Missouri has apparently written off equal educational opportunities for the pupils of the City of St. Louis when it says that districts surrounding the City of St. Louis have no responsibility and no duty to provide or to participate in a plan of desegregation unless an inter-district violation is found by the Courts against said districts.

The State has the ultimate responsibility for providing public education; the school districts are simply arms of the State, organized and established primarily for the purpose of carrying out the State's mandate to provide public education.

These Plaintiffs, as furth r reason for opposing the stay requested by the State of Missouri, would suggest that the State of Missouri is not and cannot be compared to Virginia or Michigan or other states where the final and ultimate authority for education is in local board or district.

Missouri is one district, divided into subdistricts for the benefit of the State and the State cannot and should not be permitted to enjoy the luxury of further delay by arguing, as it attempts to do in its suggestions for stay, that there must be a showing of a Constitutional violation against said districts. The question is whether the State of Missouri by its action or inaction has permitted segregation in any district. The answer must be yes.

The Courts have consistently held that regardless of the method used by a school board, in this instant, the State of Missouri, acting by and through its State Board of Education, it cannot continue the operation of dual systems of schools, Bradley, et al. v. The School Board of the City of Richmond, 382 U.S. 103, 865, Ct. 224.

The State is a party to this lawsuit and has always been a party to this lawsuit. The State had the opportunity to raise any issue in the appropriate forum and apparently did when it deemed it to be to its advantage. It cannot come in now and suggest the clean hands doctrine.

Over nine years have past since the filing of this lawsuit and 27 years since Brown v. Board of Education, 347 U.S. 483 (1954) and the children of St. Louis, especially North St. Louis, are yet in all black schools, the vestiges of segregation still abound.

These Plaintiffs would suggest that the State's motion for stay be denied.

Respectfully Submitted,

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Joseph S. McDuffie

and

By William P. Russell

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The undersigned counsel certifies that the foregoing instrument was served upon the following counsel of record on this _____ day of August, 1981.

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ORIGINAL

RECEIVED
AUG 17 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, ET AL.,)
Petitioners,)
vs.)
CRATON, LIDDELL, ET AL.,)
Respondents.)

No. 80-2152

MOTION TO FILE TYPEWRITTEN BRIEF
IN FORMA PAUPERIS

Come now Respondents by and through their attorneys, and respectfully move this Honorable Court to make and enter its order authorizing the Respondents Craton Liddell, et al to prepare typewritten copies of their brief in opposition to Petitioner's State of Missouri, et al., Application for Writ of Certiorari and as grounds therefore state:

1. That respondents are original plaintiffs who instituted this lawsuit in 1972.

2. That these respondents are poor persons without benefit of persons or orginzations to help defray the costs of this litigation. That throughout the history of this case these respondents have had an exceedingly difficult time paying expenses.

3. That these respondents have not at any time during the history of this case, had funds necessary to pay attorneys and are yet responsible for said fees and expenses.

4. That each of the plaintiffs/appellees are members of large families and their family incomes are under $20,000.00.

5. That these plaintiffs further allege that the issues involved herein are of great public interest and importance, not only in the metropolitan St. Louis area, but nationwide.

WHEREFORE, respondents pray that this Honorable Court make and enter its order permitting these respondents to prepare a typewritten brief, and for such and further orders to this Court may be meet and proper in the premises.

Respectfully Submitted,

William P. Russell

William P. Russell
Joseph S. McDuffie
Anne-Marie Clarke
Atorneys for Liddell, et al.,
408 Olive, Suite 715
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621-4525

A F F I D A V I T

We, the undersigned, first being duly sworn upon our oath say that Affiants are poor persons and the natural guardians of the minors on whose behalf this action was brought, that we do not have the financial ability to pay the costs and expenses of this litigation. That the facts stated in the attached motion are true to our best knowledge and belief.

We respectfully request that this Court permit the filing of a typewritten brief in opposition to Application for Writ of Certiorari.

Minnie Liddell
Minnie Liddell

Barbara A. Goldsby
Barbara Goldsby

Samuel Yarber
Samuel Yarber

Louise Moore
Louise Moore

Lois Le Grand
~~Louise~~ LeGrand
L or S

Subscribed and sworn to before me this 18th day of August, 1981.

Ira M. Young
NOTARY PUBLIC

IRA M. YOUNG
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS CO.
MY COMMISSION EXPIRES APR. 26 1982
ISSUED THRU MISSOURI NOTARY ASSOC.

My term expires:

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Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2152

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the City of St. Louis had failed to dismantle its dual school system as of 1977.

2. Whether, as a matter of law, there was adequate basis for the courts below to hold the State of Missouri liable for the continuation of a dual school system in St. Louis.

3. Whether the district court had the power, based upon its finding of an intra-district violation, to order the parties to seek voluntary participation of suburban school districts in a program of voluntary pupil transfers.

4. Whether the petitioners, having assented in May 1981 to a plan of pupil transfers between the St. Louis County Special School District (for special and vocational education) and the St. Louis City School District, should now be heard to challenge the district court's 1980 order to formulate such a pupil-transfer plan.

5. Whether the district court's June 1981 order, suspending operation of paragraph 12(c) of its May 1980 order, renders review of that paragraph premature.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2152

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court opinion of April 12, 1979, is reported at 469 F. Supp. 1304. The court of appeals opinion of March 3, 1980, is reported at 620 F.2d 1277. The order and opinion of the district court on remand (May 21 and June 3, 1980) are reported at 491 F.Supp. 351. The court of appeals opinion of February 13, 1981 (Pet. App. A), and the opinion of that court denying a stay pending the filing of a petition for certiorari (March 19, 1981) (Pet. App. B), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1981 (Pet. App. A-6) and an order denying, *inter alia*, the Caldwell plaintiffs' petition for rehearing and denying the State parties'[1] request for a stay was entered on March 19, 1981 (Pet. App. A-30). The petition for a writ of certiorari was filed on June 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Proceedings Below[2]

(a) This school desegregation case was commenced on February 18, 1972, by a group of black children (hereinafter, the "Liddell group") against various officials of the St. Louis, Missouri, school district alleging that the defendants had maintained and perpetuated an unconstitutional dual school system. Pursuant to a stipulation of facts filed in June 1974, these parties entered into a consent decree on December 24, 1975, which was published for comment with notice to interested parties. Among those objecting to the consent decree were the NAACP and another group of black students and parents (the "Caldwell group") who also moved to intervene. That motion was denied; the Caldwell group appealed the denial, and the court of appeals

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[1] A complete listing of the parties appears in the petition on pages II-VI. The State of Missouri and all the state officials named as defendants, petitioners here, will be referred to as the "State parties" or "petitioners."

[2] The procedural history of this case through March 3, 1980, is set forth in detail in the court of appeals' opinion of that date (620 F.2d 1277).

reversed, *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976).[3] The court of appeals also suggested (*id.* at 774) that on remand, the district court invite the United States and the Missouri State Board of Education to intervene, and that the court hear all objections to the proposed plan and receive suggested alternatives.

(b) The State Board did not move to intervene on remand. In May 1977, however, the Caldwell group and the St. Louis School Board moved to join, as defendants, the State of Missouri, the State Commissioner of Education, and the State Board of Education. The movants were supported by the United States which filed a memorandum as amicus curiae. The State parties filed a responsive paper admitting that they were proper parties under the Federal Rules, but denying responsibility for school segregation in St. Louis.[4] On July 13, 1977, the district court ordered the State parties joined. The same day, the court announced it would hold a full trial on the merits in order to determine the adequacy of the Liddell consent decree. See 469 F.Supp. at 1311. Subsequently the United States moved for and was granted leave to file a complaint in intervention (*ibid.*).[5]

(c) The State parties appeared at trial, and evidence was presented bearing upon the State's, as well as the St. Louis Board's, potential liability. The district court found (469 F. Supp. at 1313-1314)

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[3] This Court denied certiorari, 433 U.S. 914 (1977).

[4] The motions and relevant memoranda are being lodged with this Court.

[5] The white parents' groups, *i.e.*, the "Adams" and "Puleo" groups, as well as the City of St. Louis were also allowed to intervene at this stage.

that: (1) prior to 1954, the Missouri constitution provided for separate schools for black and white pupils; (2) this provision was implemented by a number of statutes that were repealed in 1955 and 1957; (3) The Missouri State Board of Education has always had constitutional and statutory authority to supervise instruction and "otherwise effectuate" the State's educational policies, (4) the State Board also distributes state aid to the districts, approves school bus routes, and passes on applications by school districts for federal aid. The court concluded, however, that no defendants were liable, because the St. Louis school system was unitary.

(d) On appeal, the court of appeals reversed. It held (620 F.2d at 1280-1288) that the "neighborhood school" policy adopted by the Board in 1954-1956 was not designed to, and in fact did not, disestablish the former statutorily required dual system. Policies pursued from 1956-1977, the court found, intensified and aggravated existing segregation (*id.* at 1288-1291). The defendants, therefore, had not fulfilled their constitutional duty; accordingly, the court remanded for remedial proceedings consistent with its opinion (*id.* at 1297). The court of appeals directed the district court to have the parties develop a plan for enlisting the voluntary cooperation of the suburban school districts of St. Louis County in programs of student transfers and exchanges (*id.* at 1296), and to apportion the costs of desegregation among the defendants (*id.* at 1295 n. 28).[6]

(e) On remand, the district court entered Supplemental Findings of Fact and Conclusions of Law (491 F. Supp. 351, 355-360). It held that the State

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[6] Only the Adams group petitioned for a writ of certiorari, No. 79-1752, which was denied on October 6, 1980.

of Missouri, which had previously required segregated schools, had an affirmative obligation "to obliterate all vestiges of such state-imposed segregation" (*id.* at 359). Having failed to fulfill that obligation, the State parties "[stood] before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty" (*ibid.*).

On May 21, 1980, the district court adopted an intra-district desegregation plan for St. Louis (491 F. Supp. 351). It ordered the State to pay half the cost of desegregation (*id.* at 353). In addition, paragraph 12 of the order directed the State parties, the United States, and the St. Louis Board of Education to develop: (a) a voluntary, cooperative plan of pupil exchanges between St. Louis and the county school districts; (b) a plan for consolidating the vocational programs operated by the city and the county Special School District; and (c) a study and plan for eventual eradication of any vestiges of state-imposed inter-district segregation (*ibid.*).[7]

(f) Several parties, including the State parties, appealed from the district court's remedial order of May 21, 1980.[8] While that appeal was pending, the district court granted a motion by the Caldwell group to add the Special School District as a party. In January 1981, with the second appeal still pending, the St. Louis Board and the Caldwell group also

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[7] The complete text of paragraphs 12(a) through 12(c), as amended by subsequent orders of the district court, appears at Pet. App. A-35 through A-39. The amending orders of September 17 and December 19, 1980, appear as Pet. Apps. C and D.

[8] On May 23 and June 24, 1980, the Caldwell group moved for leave to file an amended complaint, and to add additional state officials as defendants, to conform to the evidence in the case. These motions were granted on June 27, 1980.

moved to amend their complaints to join certain suburban school districts as additional defendants, to allege inter-district violations, and to request compulsory, as opposed to merely voluntary, inter-district relief. These motions have not been acted on to date.

2. The Court of Appeals Opinion

On February 13, 1981, the court of appeals affirmed the district court's May 21, 1980, order. The court held that it had, on the first appeal, reversed the district court's nonliability finding as to all the defendants, thereby requiring or, at least, permitting the district court to find the State responsible for St. Louis' dual system (Pet. App. A-22). With ample support in the record, the court held, it was correct for the district court to find on remand that the State parties were " 'primary constitutional wrongdoers' " (*id.* at A-23), and to order them to pay half the costs of desegregation (*ibid.*).

The court of appeals also held that the district court had the power to order all three sub-parts of paragraph 12, and did not abuse its discretion in doing so (Pet. App. A-15 to A-16). The court noted that sections (a) and (c) do not impose relief upon nonparty school districts. Section (a) requires the *defendant* districts—St. Louis and the State—to seek voluntary cooperation of nondefendant districts. Section (c) requires the *defendants* to determine what, if any, inter-district relief could lawfully be required of *them*. As for Section (b), any problem in ordering relief against the Special School District of St. Louis had been cured when it was joined as a party.

The State parties, on February 19, 1981, asked the court of appeals for a stay of its mandate or a stay of the enforcement of paragraph 12 (Pet. App.

A-33), but that motion was denied on March 19, 1981.[9] This Court also denied a stay on April 20, 1981.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State parties to this school desegregation case have been found jointly liable with local authorities for the maintenance of a dual school system, and have thus been ordered to help pay for the remedial programs. Although the St. Louis Board of Education has not challenged its liability, these petitioners contend that the court of appeals erred in the first instance in holding that St. Louis was conducting a dual system. Alternatively, they argue that they should not have been held responsible for the maintenance of that dual system, or that the relief ordered in paragraph 12 of the district court's remedial order was beyond the court's power.

None of the contentions raises an issue worthy of this Court's review. As a threshold matter, we note that during June and early July the district court has entered new orders under all three sections of paragraph 12. One order incorporates by reference a proposed consent decree under 12(b). A second places 12(c) into an inactive status indefinitely.[10]

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[9] It was called to the attention of the court of appeals that two orders amending paragraph 12 had been entered during the pendency of the appeal. The court of appeals noted those orders (Pet. App. A-35 to A-38) but said they made no changes material to the disposition of the appeal. The State parties had noticed a new appeal from those revising orders. That appeal, No. 81-1184, is now pending in the court of appeals.

[10] A third order entered on July 2, 1981, adopts a plan under 12(a). To the extent that petitioners wish to attack its express terms, they would have recourse to the court of appeals.

Petitioners' attack on the legal bases of their liability raises no substantial questions. St. Louis' schools were segregated pursuant to Missouri law. The state has been ordered to assist in remedying that constitutional violation. The decisions below were squarely governed by decisions of this Court. Accordingly, the petition should be denied.

ARGUMENT

1. The court of appeals applied the correct standards to the available data when it determined that St. Louis' school system was unconstitutionally segregated. It is undisputed that prior to 1954, Missouri law required that separate schools be maintained for black and white children. The court of appeals, reversing the district court, found that this pre-1954 dual system in St. Louis had never been dismantled despite adoption of a plan in 1954-1956 for "neighborhood" schools (620 F.2d at 1284-1287). As part of the basis for this finding, the court of appeals noted that the available data tend to show that the plan resulted (*id.* at 1284) "in most of the student population continuing to attend one-race or virtually one-race schools." In 1962, the first year after 1954 that the schools kept racial data, "all [28] of the formerly black elementary schools still in existence were all or virtually all black" (*id.* at 1285). Teacher assignments mirrored the race of the students both at the original all-black schools and at those that had become predominantly black in the interim (*ibid.*).

Petitioners now argue that these data furnished no basis for a presumption that the original all-black schools remained all black between 1954 and 1962, or that they were purposefully denominated "black" by the St. Louis school district. In so arguing, peti-

tioners ignore the established rule that it was their burden (and that of the other defendants) to rebut the presumption that one-race schools in a formerly *de jure* system are vestiges of that dual system. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971). That the authorities saw fit to assign only black teachers to the schools which had been all-black in 1954 (and which were all-black in 1962) tends to support the hypothesis that official design, not mere population movement, was responsible for the schools' racial identifiability. *Swann*, *supra*, 402 U.S. at 18. Petitioners' argument that population movements resegregated the schools that had been black in 1954 has no support in the record. Population movement at a time when schools were pervasively segregated may instead have added to the number of one-race schools. This Court, in *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 n.13 (1979), noted that, rather than rebutting the prima facie case, such evidence of population movement, in a context of systemwide school segregation, tends to show the reciprocal influences of segregated schools and segregated living patterns.

2. The State parties had notice at all times of the claims against them for maintenance of a dual system in St. Louis. Their contention that they were denied due process is therefore without merit. The State parties' liability, moreover, is firmly rooted in prior decisions of this Court and the lower courts.

(a) Petitioners' contention (Pet. 13) that until the Caldwell group amended its complaint, they "had no opportunity to defend in any meaningful manner because they had no notice of any particular allegations against them" is unsupported. The motions to have the State parties added as defendants, to-

gether with the supporting memoranda,[11] set forth the facts and legal bases for liability more thoroughly than notice pleading under Rule 8, Fed. R. Civ. P., would have demanded. Since June 1977, the parties have never changed their basic theory of State liability, which the district court adopted in May 1980,[12] and which the court of appeals affirmed in February 1981 (Pet. App. A). Considering that the State parties actively participated in every phase of this case since trial in 1977, including all remedial hearings, petitioners' claim to have been denied property without a prior hearing is without factual basis.[13]

After trial, the Caldwell plaintiffs amended their complaint to allege causes of action against the State parties. That step is permitted (though not required) by Rule 15(b), Fed. R. Civ. P., where issues not raised by the formal pleadings have been tried by consent of the parties.[14] The rule assumes that tri-

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[11] See Statement, *supra*, page 3.

[12] 491 F. Supp. at 359-360, summarized, *supra*, pages 4-5.

[13] In addition to their due process claim, petitioners contend that on the appeal decided March 3, 1980, the court of appeals did not really reverse the district court's finding of nonliability as to them (see Pet. 14-15). The relevance of that contention at this stage is unclear. On remand, the State parties had an opportunity to appear in the district court and argue or adduce evidence to show why they should not have to participate in the remedy. The district court made its additional findings including the finding that the State was a "constitutional wrongdoer" (491 F. Supp. at 355). On appeal, the court of appeals expressly affirmed this conclusion (Pet. App. A-22 to A-23).

[14] Rule 15(b) reads in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be

able allegations can be made and issues joined by means other than complaint and answer.

b. Decisions of this Court, and of the lower courts, squarely authorize the decision in the present case to hold the State liable, and to require it to pay part of the cost of desegregation. The petitioners here point to no authority for their position, and do not claim there is a split among the circuits on the issue of state liability.

State responsibility to disestablish dual systems dates back to *Brown* v. *Board of Education* (*Brown I*), 347 U.S. 483 (1954) and *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294 (1955), in which this Court imposed upon states operating legally-mandated dual systems the obligation to dismantle them "with all deliberate speed" (*Brown II*, *supra*, 349 U.S. at 301). This duty arises from the state's assumption of responsibility, pursuant to its own constitution, to offer universal public education. Cf. *Swann* v. *Charlotte-Mecklenburg*, *supra*. The existence of the duty does not depend upon the state's having taken affirmative steps to interfere with desegregation. *Evans* v. *Buchanan*, 447 F. Supp. 982, 1037-1039 (D. Del.), aff'd, 582 F.2d 750, 766-767 (3d Cir. 1978), cert. denied *sub nom. Delaware State Board of Education* v. *Evans*, 446 U.S. 923 (1980);[15] *United States* v. *Missouri*, 363 F. Supp.

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treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise those issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

[15] In an earlier stage of the Delaware desegregation case, a three-judge district court held that to the extent that any

739, 742, 747-748 (E.D. Mo. 1973), aff'd in pertinent part, 515 F.2d 1365 (8th Cir.), cert. denied, 423 U.S. 951 (1975); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), aff'd with modifications, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).[16]

It is not disputed that Missouri, pursuant to art. IX of its constitution, has undertaken to furnish universal public education to the state's children, and until 1954, required that this be done on a segregated basis. Nor is it in doubt that the State Board is empowered, by its constitution and statutes, to administer state aid to the districts, approve bus routes, supervise instruction, gather information, and "otherwise effectuate the educational policies of the State" (469 F. Supp. at 1314). The State parties also approve district applications for federal

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schools in the state are in violation of *Brown*, the State Board is *primarily* responsible (379 F. Supp. at 1222). The phase of the case cited above was the remedial phase, in which the State was ordered to pay for specific educational programs instituted ancillary to desegregation. In support of that order, the district court said (447 F. Supp. at 1038): "Having failed over time to fulfill its constitutional obligation to provide a nondiscriminatory system of education for the children of this state, the State must now share the cost necessary to remedy the wrongs it perpetuated."

[16] In a series of Michigan cases, the courts examined specific st e actions as part of the determination whether the state, having no statute mandating segregation, was implicated at all in purposeful discrimination. See *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143, 163, 185-190 (W.D. Mich. 1973), aff'd, 508 F.2d 178, 186 (6th Cir. 1974), cert. denied *sub nom. Michigan State Board of Education* v. *Oliver*, 421 U.S. 963 (1975); *Bradley* v. *Milliken (Milliken I)*, 484 F.2d 215, 238-242 (6th Cir. 1973), rev'd on other grounds, 418 U.S. 717 (1974).

assistance, which is subject to nondiscrimination requirements. Compare *United States* v. *Texas*, *supra*. The petitioners do not claim to have done anything whatever to help, urge, or force the St. Louis school district to dismantle its dual system. We submit that the district court on remand clearly applied the correct legal standards to these facts. See 491 F. Supp. at 359-360.

This liability finding was also an adequate basis for requiring the State parties to share the cost of desegregation. In *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267 (1977), this Court sustained the lower court's decision to require the State of Michigan to pay half of certain costs of Detroit's school desegregation. In the process of explaining why the Eleventh Amendment did not bar this judgment, this Court pointed out that the State could be required to spend money to fulfill its own duty to correct its own past violations of Equal Protection. *Id.* at 289-290.

In general, where states have been ordered to pay part of the costs of desegregation, that order has been predicated, as it was in this case, on the states' abdication of their affirmative duty to disestablish the *de jure* system for which they bear responsibility—whether by statute, past action, or past purposeful inaction. *Milliken II*, *supra*, 433 U.S. at 289; *Evans* v. *Buchanan*, *supra*, 447 F. Supp. at 1037-1039; *United States* v. *Board of School Commissioners of Indianapolis*, 456 F. Supp. 183, 191-192 (S.D. Ind. 1978), aff'd in part, 637 F.2d 1101 (7th Cir. 1980), cert. denied, No. 80-129 (Oct. 6, 1980); see also *Oliver* v. *Kalamazoo Board of Education*, *supra*, 368 F. Supp. at 205, and *United States* v. *Texas*, *supra*, 321 F. Supp. at 1045, and 447 F.2d at 446-448 (costly remedial action required of Texas).

3. Petitioners contend that the district court had no power to order the parties (in paragraph 12(a) of its remedial order) to prepare a plan of voluntary inter-district student transfers. Petitioners rely (Pet. 21) on *Milliken I*, *supra*, but they apparently recognize (Pet. 21-22) that *Milliken I*, *supra*, merely prohibits the *imposition* of relief upon nonparty school districts that have not been found to have participated in the creation or maintenance of a dual system. The court can, however, order those who have been found liable to make efforts to *persuade* those nonparty districts to cooperate voluntarily. *Hills* v. *Gautreaux*, 425 U.S. 284 (1976).[17]

4. In Point IV of their petition, the State parties challenge the district court's power to order, as it did in paragraph 12(b) of its May 1980 decree, that the parties develop and submit a plan "for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis * * *." At the time this order was originally entered, the Special District of St. Louis County was not a party to this suit. Whatever issues might have been raised by that circumstance have since been put to rest.

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[17] Petitioners (Pet. 22) rely upon a footnote in this Court's opinion in *Hills* v. *Gautreaux*, *supra*, 425 U.S. at 298 n.13, for the proposition that even where the state is found liable, interdistrict relief is improper in school cases. The *Hills* footnote discussing *Milliken I*, *supra*, is inapposite. In *Milliken*, the issue was whether nonparty suburban districts could be *compelled* to participate in desegregation—either by the court directly, or indirectly by means of an order directed to the State. That question is not involved here, for nothing in the decree imposes compulsory participation in desegregation on any nonparty.

On May 21, 1981, six of eight groups of parties—including the Special School District, which was joined as a defendant in September 1980, and the petitioners here—signed a proposed consent decree incorporating a plan for pupil transfers between the vocational educational programs of the two districts; the court thereupon signed and entered that decree.[18] Concerned that the absence of some parties from the consent decree might create a problem in its enforcement (see Pet. App. A-71), the district court reentered the May 21, 1981, plan as an order of the court on June 11, 1981 (Pet. App. F).[19]

Having consented to entry of the very plan that has been ordered, petitioners should not now be heard to attack the legal basis for entry of *any* order involving the Special School District. In any event, the district court clearly had the power both to enter paragraph 12(b) of its May 1980 decree and to implement it by the order of June 11, 1981.

The St. Louis School Board and the State parties were both found liable for perpetuating *de jure* segregation in St. Louis schools. Both sets of parties can be required to undertake whatever relief is best calculated to correct the effects of that past discrimination so long as the relief does not intrude upon the rights of nonparty school districts. The Special School District is a party to this suit, and it has agreed to the pupil exchange plan.

5. Paragraph 12(c) of the court's May 1980 order as amended (Pet. App. A-31 to A-38) calls upon the parties to this suit to suggest a plan to eradicate

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[18] A copy of the consent decree is being lodged with this Court.

[19] At that time, the court also reissued some specific orders regarding funding for the plan (see, *e.g.*, Pet. App. A-75 to A-76).

"government-imposed" segregation. In the appeal decided February 13, 1981, the court of appeals held that the quoted language must be read to mean imposed by parties to the case, including the petitioners (Pet. App. A-15 to A-16). In other words, this paragraph requires the St. Louis and State parties to undertake an investigation of their own practices, report the results of that investigation, and to propose corrective action to the court. The order does not require any corrective action or mandatory participation of nonparty school districts in desegregation.

On June 23, 1981, moreover, the district court granted a motion to "Terminate Further Reporting Under Paragraph 12(c)." [20] The court's order makes it clear that it does not plan to consider the possibility of mandatory inter-district relief until the voluntary plan has had a chance to work. Accordingly, if any question remains as to the validity of paragraph 12(c), there is no need for this Court to resolve it at this time.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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AUGUST 1981

[20] This order is being lodged with this Court.

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No. 80-2152

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Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., TO PETITIONERS' SUPPLEMENTAL BRIEF

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REPLY OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., TO PETITIONERS' SUPPLEMENTAL BRIEF

On September 16, 1981, Petitioners filed a "Supplemental Brief" ("Pet. Supp. Br.") to "advise the Court of events which have occurred since the filing of petitioners' petition," Pet. Supp. Br., at 1, and Petitioners have raised certain additional arguments based upon their view of those new developments. Respondents The Board of Education of the City of St. Louis, Missouri, *et al.* ("City Board"), have already responded in their

Brief in Opposition to most of Petitioners' points, and we will not repeat those arguments here. However, since Petitioners' Supplemental Brief mischaracterizes the recent orders of the court below and the procedural posture of this case, we submit this short reply.

1. Petitioners argue that the District Court's July 2, 1981, Order somehow contradicts the City Board's argument that the purely procedural provisions of paragraph 12(a) of the District Court's May 21, 1980, Order do not warrant review. *See* City Board Brief in Opposition, at 12. Petitioners acknowledge that they have appealed the July 2, 1981, Order to the Eighth Circuit, Pet. Supp. Br., at 3, but they wholly fail to explain how the existence of the July 2 Order makes the District Court's earlier order, which is the subject of the instant Petition, worthy of review.

As the City Board has noted, paragraph 12(a) of the May 21, 1980, Order "imposed no obligations on petitioners other than the requirement that they draft a proposed plan. Thus, at this stage, and in this Court, Petitioners' challenges to paragraph 12(a) are entirely premature, and do not warrant review." City Board Brief in Opposition, at 12 (footnote omitted). Now that the District Court in fact has entered an order based on one of the plans proposed by the parties, it is even clearer that Petitioners' real objection is to the terms of the Order entered on July 2, 1981, not to the Court's May 21, 1980, Order which simply required submission of proposed plans. Moreover, the City Board has previously demonstrated that both paragraph 12(a) of the May 21, 1980, Order and the subsequent Order of July 2, 1981, contemplate purely voluntary transfers of students, and thus Petitioners' objections are wholly misplaced. City Board Brief in Opposition, at 10-14. In any event, since the July 2, 1981, Order is not now before this Court for review, Petitioners' arguments concerning that

Order are irrelevant here, and should be addressed in the first instance to the court of appeals.[1]

2. Petitioners rely upon the District Court's August 24, 1981, Orders to continue to suggest that the trial court intends by means of the paragraph 12(c) process to order a mandatory inter-district desegregation plan against suburban school districts not found to have been involved in an inter-district violation. Pet. Supp. Br., at 5-6. Petitioners have mischaracterized the trial court's orders for the purpose of suggesting incorrectly that this case presents an issue under *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*).

As we noted previously, the District Court has made clear that no suburban school district will be ordered to participate in any inter-district remedy unless and until it is found to be involved in an inter-district constitutional violation within the meaning of *Milliken I*. *See* City Board Brief in Opposition, at 15 & n.16. There is no basis for Petitioners' suggestion that the trial court now intends to proceed in a different fashion. In its August 24, 1981, Order, the District Court granted in part motions filed by the City Board and the Caldwell Plaintiff-Intervenors to file inter-district pleadings and made 17 of the 23 school districts in St. Louis County defendants. The Court ordered discovery completed within 90 days, and scheduled a hearing on March 1, 1982, on the "12(c) aspects" of this cause. Pet. Supp. Br. at A-46. Those "aspects" involve both paragraph

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[1] Contrary to the suggestion of the Petitioners, *see* Pet. Supp. Br., at 4, the court of appeals has not approved the "enforcement" of paragraph 12(a), or any other aspect of the July 2, 1981, Order. The Eighth Circuit simply approved the District Court's May 21, 1980, Order, including paragraph 12(a), which called for the submission of proposed plans; the appellate court has not to date considered the merits of any proposed plan submitted by the parties or ordered by the District Court pursuant to paragraph 12(a).

12(c) itself and the inter-district allegations contained in the amended pleadings filed by the City Board and the Caldwell Plaintiffs-Intervenors. Moreover, in its August 24, 1981, Order, the Court made it clear that it intends to hear evidence at that time on "both alleged constitutional violations and proposed remedies." *Id.* Thus, despite Petitioners' out-of-context citation to certain elements of the judge's Order, it is clear that the Court has reactivated the paragraph 12(c) requirement in order to allow for the submission of proposed remedial orders in time for the March 1, 1982, hearing on the merits.

As with their paragraph 12(a) arguments, Petitioners' objections to paragraph 12(c) totally confuse the distinction between requiring the drafting of a proposed plan, and requiring implementation of a plan. Nothing in *Milliken I*, or any other legal precedent, suggests that a court cannot require parties to draft their proposed orders prior to trial, so that the court can try liability and remedy issues at the same time.

Moreover, as the City Board emphasized repeatedly in its earlier Brief in Opposition, there is absolutely no dispute among the parties here about the fact that "no [inter-district] relief would be proper absent a finding of an interdistrict violation, or an intradistrict violation with interdistrict effects, as required by *Milliken I*." *See* City Board Brief in Opposition, at 10 n.10.[2] The United States and the Caldwell Plaintiffs-Intervenors have stressed the same point. *See* Brief of the United States in Opposition, at 16; Brief in Opposition of Respondents,

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[2] *Accord*, City Board Brief in Opposition, at 12-13 n.13 ("suburban districts cannot be required to participate in any interdistrict remedy unless they are made parties to a case that meets the standards set forth in *Milliken I*"); *id.* at 15 (paragraph 12(c) "neither called for nor contemplated implementation of [an interdistrict] plan prior to further evidentiary proceedings").

Earline Caldwell, *et al.*, at 17. Thus, Petitioners' suggestion that the recent orders raise an issue under *Milliken I* simply misstates the action taken by the court and the positions asserted by the parties.

3. Finally, Petitioners argue that "it is patently improper (particularly when the defendants are governmental entities) for a court to put its stamp of approval on any particular dollar amount to achieve [a remedy] or to require the funds to come from any particular public source." Pet. Supp. Br., at 9-10. This argument is simply incomprehensible; Petitioners do not refer to any court order in this case similar to the one they describe and attack, and in fact no such order exists.

It is true that the City Board, like the Petitioners, has been ordered by the District Court to implement an intradistrict remedial plan, and to pay half the expenses required for such a plan. *See Liddell* v. *Board of Education*, 491 F. Supp. 351, 352-53 (E.D. Mo. 1980). There is absolutely nothing in any order entered in this case, however, which suggests the "particular public source" for these costs, or which tells the State, the City Board, or any other party "where to get the money," as suggested by Petitioners. Pet. Supp. Br., at 10. The trial court has simply followed the eminently reasonable approach of approving a budget (based on submissions by the parties) specifying the *maximum* costs for the precise remedy ordered by the Court. It should be emphasized, however, that nothing in the Court's orders requires the Petitioners or the City Board to spend the full amount in the budget *if* the ends can be accomplished for a lesser cost. The budget simply gives the parties the helpful guidance of precise dollar maximums for each year with regard to the anticipated cost of enforcing the Court's Order. Since Petitioners have been held to be "primary constitutional wrongdoers," 491 F. Supp. at 359, they of course can be required to pay whatever costs are reason-

ably required to remedy their wrongs. The Petitioners hardly should be heard to complain because the District Court *limited* their liability to a maximum cost.

CONCLUSION

For the foregoing reasons, and for those set forth in their earlier Brief in Opposition, Respondents The Board of Education of the City of St. Louis, Missouri, *et al.*, respectfully urge this Court to deny the instant Petition for a Writ of Certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the following Reply of Respondents Board of Education of the City of St. Louis, *et al.*, to Petitioners' Supplemental Brief, were mailed, postage prepaid, this 23rd day of September, 1981 to:

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MOTION FILED
JUN 25 1981

80-2152

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

CRATON LIDDELL, *et al.*,

and

EARLINE CALDWELL, *et al.*,

and

JANIS ADAMS, *et al.*,

and

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,

and

THE CITY OF ST. LOUIS, MISSOURI, and the UNITED STATES OF AMERICA,
Respondents.

On Application For a Writ of Certiorari to the Eighth Circuit Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE WITH BRIEF ATTACHED

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Section 161.092 RSMo. 11

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

INTEREST OF THE MOVANTS

The Bayless School District, Brentwood School District, Clayton School District, Hancock Place School District and Jennings School District are all located within St. Louis County, Missouri; the Consolidated School District No. 6, Crystal City

School District No. 47, DeSoto School District No. 73, Dunklin School District R-5, Hillsboro School District R-III, Reorganized School District R-VI, Reorganized School District R-VII, Northwest Reorganized School District No. I, Sunrise School District R-IX and Windsor Consolidated School District No. I are all located in Jefferson County, Missouri; Orchard Farm School District is located in St. Charles County, Missouri.

1. In 1972, a group of black students residing within the City of St. Louis and their parents instituted this lawsuit in U.S. District Court for the Eastern District of Missouri, alleging that the public schools of the City of St. Louis, Missouri were racially segregated. The City of St. Louis is an independent political and geographical entity, with the Board of Education of the City of St. Louis having responsibility for the public schools located within the City. The boundaries of the St. Louis City School District are coterminous with the boundaries of the City itself.

2. On April 12, 1979, the Court concluded that the Board of Education of the City of St. Louis and the State of Missouri had committed no constitutional violations, had fulfilled their constitutional obligations to create a unitary school system, and that any subsequent resegregation of the City of St. Louis school system had resulted from demographic factors, not acts or omissions by the Board of Education or the State of Missouri.

3. That decision was reversed by the Eighth Circuit Court of Appeals and the case was remanded to the District Court solely for the purpose of devising and implementing a plan to alleviate segregation within the City of St. Louis school system. *Adams v. U.S.*, 620 F.2d 1277 (8th Cir. 1980).

4. Pursuant to that opinion, the District Court entered its order on May 21, 1980. Paragraph 12 of the Order provided, in pertinent part:

> 12. The State Defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:

a. To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

. . .

c. To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

5. The State of Missouri Defendants sought a stay of this Order in the District Court, Court of Appeals and from two Justices of this Court. Those applications were denied. On September 17, 1980 and December 19, 1980, the District Court entered further Orders, which expanded the scope of the relief ordered in Paragraphs 12 (a) and (c) of its Order of May 21, 1980, to include the Missouri counties of Jefferson and St. Charles. The expanded Order also required the State of Missouri to enumerate those districts within the three subject counties which were willing to participate in the plan, those not willing to participate in the plan, and the number of students that each district was willing to receive. Further, the participating school districts were to delineate "those that they desire to send outside of their district . . . including the race and grade of those students." (Appendix A). The amended Order further required the preparation of a "feasibility plan of inter-district school desegregation involving the St. Louis School District and such suburban school districts, that will provide

complete and lasting school desegregation." That plan "should specifically include pupil assignment and administrative reorganization provisions."

6. The State of Missouri Defendants sought a stay of the District Court's December 19th Order in the Eighth Circuit Court of Appeals, where the appeal of the District Court's Order of May 21, 1980, was still pending. The stay was denied by the Court of Appeals on February 13, 1981, at which time the Court of Appeals also filed its opinion in this matter, affirming the District Court. *Liddell* v. *Board of Education,* Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735 (8th Cir. Feb. 13, 1981).

7. If the Order of the District Court of May 21, 1980, as modified by the Orders of September 17, 1980 and December 19, 1980, and affirmed by the Eighth Circuit Court of Appeals is allowed to stand, it will have a clear and significant impact upon these Movants. Enforcement of the Order would lead to the development and implementation of plans providing for the exchange of students not just between the City of St. Louis School District and the school districts located in St. Louis County, Jefferson County and St. Charles County, but also between the St. Louis County school districts themselves. Further, the Order requires that plans submitted specifically include pupil assignment and administrative reorganization provisions encompassing the school districts located within St. Louis County, as well as additional counties "limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances". Jefferson and St. Charles Counties are, after St. Louis County, the Missouri counties most proximate to the City of St. Louis.

COMPLIANCE WITH RULE 42

Counsel for all parties have been contacted by counsel for Movants, and have indicated they would consent to the grant of this Motion. Written consents will be filed with the Clerk as soon as possible.

WHEREFORE, Movants pray that leave be granted them to file the annexed brief as Amici Curiae.

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No.

IN THE

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THE CITY OF ST. LOUIS, MISSOURI, and the UNITED STATES OF AMERICA,
Respondents.

On Application For a Writ of Certiorari to the Eighth Circuit Court of Appeals

BRIEF OF AMICI CURIAE

A. INTEREST OF AMICI

The interests of the amici curiae in this case are as stated in the Motion for Leave to file this Brief, *supra*. If the Order of May 21, 1980, as modified by the Orders of September 17, 1980 and December 19, 1980, is allowed to stand, it will have a clear and significant impact upon every school district located within St. Louis County, Jefferson County and St. Charles County.

B. ARGUMENT

The decision of the Eighth Circuit Court of Appeals, affirming the Order of the District Court, is in error and should be reversed. The trial court exceeded its jurisdiction in ordering a "voluntary" plan, encompassing inter-district pupil transfers, to remedy intra-district school segregation. The issue of inter-district Constitutional violations was neither pleaded nor tried, and no finding of any liability has been entered regarding any St. Louis County, Jefferson County or St. Charles County School District. As such, the remedy ordered by the District Court, as affirmed by the Eighth Circuit Court of Appeals, exceeds the scope of the violations found, and thus the District Court had no jurisdiction to enter such an Order.

The Order of the District Court, as affirmed by the Court of Appeals, requires the State defendants, the United States, and the St. Louis Board of Education to submit to the Court a plan of inter-district school desegregation "necesary to eradicate remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." The plan is to include not only St. Louis City and County, but is to be "limited only by consideration of feasibility and practicality, including reasonableness of transportation times and distances." Further, the plan should "specifically include pupil assignment and administrative reorganization provisions."

This Court, in *Swann* v. *Charlotte Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971), addressed the question of remedies in school desegregation cases generally, and stated: "(as) with any equity case, the nature of the violation determines the scope of the remedy."

Milliken v. *Bradley,* 418 U.S. 717 (1974), established the standards by which any order requiring an inter-district remedy would be evaluated. The Court applied the principle articulated

in *Swann* v. *Charlotte Mecklenberg, supra,* stating that school desegregation remedies are designed "as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 418 U.S. at 746. Elaborating upon the bases for imposing an inter-district remedy, the Court held:

> "Before the boundaries of separate and autonomous school dstricts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a Constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus, an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy." 418 U.S. at 744-45.

In the present case, as in the *Milliken* case, the only theory upon which the case was litigated was one related to intra-district segregated schools. The relief sought in the complaints extended only to the public school system within the City of St. Louis. No findings were entered that the State Defendant or any suburban school district had committed any constitutional violations which could have had an inter-district effect and justify an inter-district remedy. As such, the *Milliken* decision would prohibit any remedy being ordered which would extend beyond the boundaries of the St. Louis School District. The

Eighth Circuit Court of Appeals, in its decision of February 13th, upheld Section (a) of Paragraph 12 on the basis that "the voluntary exchanges contemplated by Section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City." *Liddell* v. *Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip. op. at 19 (8th Cir. Feb. 13, 1981).

However, Amici have found no case in which a Court has alleviated an intra-district violation with an inter-district remedy. The fact that the School District of the City of St. Louis is predominantly black does not justify ignoring the Court's holding in *Milliken* v. *Bradley* regarding inter-district remedies. This Court has previously stated that the United States Constitution does not require any particular balance between black and white students; in *Swann*, this Court held that the mere existence of a predominantly one-race school did not violate the Fourteenth Amendment. 402 U.S. at 24. *Milliken* made it clear that the mere existence of a one-race school district did not violate the U.S. Constitution. 418 U.S. at 740.

The Eighth Circuit is clearly in error in its affirmation of the District Court, for there has been no finding of vestiges of segregation in St. Louis County, and the violations found within the City of St. Louis cannot serve as a basis for an inter-district remedy. Furthermore, neither the State nor any other defendant has the power to impose an inter-district remedy which would encompass St. Louis County, Jefferson County or St. Charles County. The local school boards of the various school districts in the State of Missouri have complete control over the schools located within each district. The Statutes of the State of Missouri make it clear that the State is to exercise no control over local schools. Section 171.011 of the Revised Statutes of the State of Missouri provides in pertinent part:

> The School Board of each school district in the State may make all needful rules and regulations for the organization, grading and government in the school district. RSMo. 1978.

Further, Section 177.011 of those Statutes provides:

> The title of all school house sites and other school property is vested in the district in which the property is located. All property leased or rented for school purposes shall be wholly under the control of the School Board during such time. No Board shall lease or rent any building for school purposes while the district school house is unoccupied, and no school house or school site shall be abandoned or sold until another site and house are provided for the school district. RSMo. 1978.

Section 167.151 of the Missouri Statutes gives the school boards of the various districts complete discretion as to the admission of non-resident pupils. The only exceptions apply to students who have easier access to a school within another district, or who have no high school within their home district. The State of Missouri has no power to effect pupil assignments or administrative organization within the various school districts; the only powers the State Board of Education possesses are contained in Section 161.092 of the State Statutes. (Appendix B).

Perhaps most definitively, Section 40 of Article 3 of the Missouri Constitution states that the General Assembly shall not pass any local or specific law:

> 20) Creating new townships or changing the boundaries of townships or school districts.
>
> 21) Creating offices, prescribing the powers of officers in, or regulating the affairs of counties, cities, townships, election or school districts.
>
> 24) Regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes.

Local automony is an integral part of the public education system of the State of Missouri, and both the Constitution and Statutes reflect that fact.

The District Court's Order of December 19, 1980 (see attached Appendix A) required the State Defendants to assume that all St. Louis County school districts will participate in any voluntary plan and to provide specific data on the racial composition and space available in each district. The District Court also ordered the State to provide information regarding the location of new magnet schools within St. Louis County. Further, the State is ordered to report back to the District Court not only the school districts which have indicated their willingness to participate, but also as to those districts which have indicated they are not willing to participate in any "voluntary" plan.

An examination of the District Court's December 19, 1980 Order, and the memorandum accompanying it (Appendix C), reveals the true involuntariness of the proposals. The State Defendants are ordered to provide figures on *all* districts, regardless of whether those districts have agreed to participate in a plan. The only purpose which could possibly be served by this reporting requirement would be to coerce individual school districts into agreeing to participate in a court ordered plan. If space were available in a particular district, intense pressures could be brought against that district to participate in a plan, even though it is under no constitutional obligation to do so. Further, the Memorandum accompanying the Order requires that the State include in any plan submitted "a plan providing for the interchange of students *between the districts* of the county in order to achieve more integregation, and between the county and the city." The phrase "to achieve more integregation" can only apply to the various county school districts. At this point, the District Court has totally abandoned the pretext of attempting to develop a voluntary plan to alleviate segregation within the City of St. Louis. The District Court has now moved totally outside the bounds of its jurisdiction, and is attempting to "in-

tegrate" totally autonomous school districts, none of which have been alleged to operate anything less than a unitary plan, and none of which are before the Court. The principles of *Swann* v. *Charlotte Mecklenberg Board of Education, supra,* and Milliken v. Bradley, are now being totally disregarded by the District Court. As this Court stated in Milliken:

> "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts." 418 U.S. at 749.

The District Court is not only trying to do exactly what this Court has held it has no jurisdiction to do, but is also actually trying to affect the racial composition of the surrounding districts themselves.

The Order of May 21, 1980, as modified, requires the State Defendants to prepare a "feasibility plan" to provide complete and lasting school desegregation between the City of St. Louis and the surrounding districts. That plan "should specifically include pupil assignment and administrative reorganization provisions." The Eighth Circuit Court of Appeals, in its opinion of February 13, 1981 upholding the District Court's Order of May 21, 1980, dispelled any doubts as to the exact nature of the plan contemplated. The Court of Appeals stated:

> "We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop *and implement* the plans contemplated by Paragraph 12." Liddell v. Board of Education, *supra,* at p. 20

What had originally been characterized as a study of the "feasibility" of a voluntary plan to alleviate school segregation within the City of St. Louis is now clearly identified as an order of the Court to develop and implement a plan not just to

alieviate segregation within the City of St. Louis, but to develop a system of pupil and administrative rearrangement which would result in significant alteration of the current system of school administration within the City of St. Louis, St. Louis County, St. Charles County and Jefferson County. Specifically, the county school districts would be immediately impacted, inter alia, as follows: 1. The present staff would have to be increased in order to maintain current student-teacher ratios; 2. An extensive program of staff reorientation and retraining would be required in order to effectuate a smooth assimilation of the new students into the receiving districts' educational environment; 3. Additional equipment, including teaching aids, would have to be acquired in order to maintain educational standards for the increased number of students.

Contrary to the statement of the Court of Appeals, the State of Missouri is under no legal obligation to implement any plan contemplated by Paragraph 12. Not only is the State not legally obligated, it is without the power to implement such a plan.

These amici now find themselves in an untenable position. Paragraph 12(c) of the order of the District Court, as affirmed by the Court of Appeals, requires the State of Missouri to develop *and implement* a plan to "eliminate the vestiges of segregation" within St. Louis County, and to develop *and implement* a plan of pupil and administrative rearrangement for the school districts of St. Louis County, St. Charles County and Jefferson County. Such a plan could only be implemented through an extensive program of cross-district busing, coupled with extensive reassignments of local administrative personnel. This would require local school districts within the subject counties to surrender control of the education of any students residing within one school district who are bused to another district. Further, it would require transfers and reassignments of local administrative personnel, who had been hired and trained by the individual school districts and are familiar with the strengths and weaknesses, as well as the educational

philosophies, unique to each district. For the county school districts to participate in such a plan would be completely contrary to the principles ingrained in the public education system of this State, as clearly evidenced by the statutes cited above.

Further, a refusal to participate on the part of any amici would be condemned as an attempt to preserve the "vestiges of segregation within St. Louis County," as well as an attempt to block "complete and lasting school desegregation." We must reiterate that no court has entered a finding that any "vestiges of segregation" exist within St. Louis County. Further, no school district within St. Louis County, St. Charles County or Jefferson County has been alleged or shown to maintain anything less than a completely unitary system, and thus there has been no indication of a need for a plan of "complete and lasting school desegregation."

The District Court and the Eighth Circuit Court of Appeals have exceeded the bounds of their jurisdiction and are attempting to interject their judgment into the operations of State and local governmental entities. The concept of "complete and lasting school desegregation" is nothing more than a euphemism for a determination by the District Court and the Court of Appeals that some sort of racial balance should be achieved throughout the entire metropolitan area. As such, those Courts are in a position remarkably similar to the position of the lower courts in *Milliken,* where this Court found that the attempt to impose a metropolitan-wide remedy for the entire Detroit area was based upon the perception of the District Court and the Court of Appeals that "total desegregation of Detroit would not produce the racial balance which they (the courts) perceived as desirable." 418 U.S. at 740. At least in that case, the suburban school districts were parties to the litigation, if only for a short time.

In *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977), this Court reiterated the burden which must be met before the Federal Courts will be allowed to transcend local control of public education:

> "The case for displacement of the local authorities by a Federal Court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." 433 U.S. at 410.

No factual proof has been introduced in this case; no statements of legal principes have been proffered. The State of Missouri has been ordered to develop and implement a plan which would include pupil assignment and administrative reorganization in school districts in St. Louis County, Jefferson County and St. Charles County, none of which has been before the Court.

CONCLUSION

This Court has, in the cases of *Milliken* v. *Bradley, supra,* Swann v. Charlotte Mecklenberg, *supra,* and Dayton Board of Education v. Brinkman, *supra,* established strict standards which, if met, would justify the imposition of an inter-district remedy to alleviate school segregation, even if such a remedy would result in the displacement of local authorities who traditionally had control of the education of the students residing within their district. The District Court and the Eighth Circuit Court of Appeals have now seen fit to totally disregard those carefully drawn standards, and accordingly should be reversed.

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APPENDIX

APPENDIX A

This quotation of the text of Paragraph 12 of Order of May 21, 1980, includes the amendments to that paragraph made by the court on September 17, 1980, indicated in italics. It includes the amendments made by the court on December 19, 1980, underlined.

* * * * *

12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by *December 15, 1980.*

The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school district, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students

of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commission of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or before February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by *December 15, 1980*, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

APPENDIX B

Section 161.092 of the revised statutes of the State of Missouri provides as follows:

161.092. Powers and duties of state board.—The state board of education shall:

(1) Adopt rules governing its own proceedings and formulate policies for the guidance of the commissioner of education and the department of elementary and secondary education;

(2) Carry out the educational policies of the state relating to public schools that are provided by law and supervise instruction in the public schools;

(3) Direct the investment of all moneys received by the state to be applied to the capital of any permanent fund established for the support of public education within the jurisdiction of the department of elementary and secondary education and see that the funds are applied to the branches of educational interest of the state that by grant, gift, devise or law they were originally intended, and if necessary institute suit for and collect the funds and return them to their legitimate channels;

(4) Cause to be assembled information which will reflect continuously the condition and management of the public schools of the state;

(5) Require of county clerks or treasurers, boards of education or other school officers, recorders and treasurers of cities, towns and villages, copies of all records required to be made by them and all other information in relation to the funds and condition of schools and the management thereof that is deemed necessary;

(6) Provide blanks suitable for use by officials in reporting the information required by the board;

(7) When conditions demand, cause the laws relating to schools to be published in a separate volume, with pertinent

notes and comments, for the guidance of those charged with the execution of the laws;

(8) Grant, without fee, certificates of qualification and licenses to teach in any of the public schools of the state, establish requirements therefor, formulate regulations governing the issuance thereof, and cause the certificates to be revoked for the reasons and in the manner provided in section 168.071, RSMo;

(9) Classify the public schools of the state, subject to limitations provided by law, establish requirements for the schools of each class, and formulate rules governing the inspection and accreditation of schools preparatory to classification;

(10) Make an annual report on or before the first Wednesday after the first day of January to the general assembly or, when it is not in session, to the governor for publication and transmission to the general assembly. The report shall be for the last preceding school year, and shall include: (a) a statement of the number of public schools in the state, the number of pupils attending the schools, their sex, and the branches taught; (b) a statement of the number of teachers employed, their sex, their professional training, and their average salary; (c) a statement of the receipts and disbursements of public school funds of every description, their sources, and the purposes for which they were disbursed; (d) suggestions for the improvement of public schools; and (e) any other information relative to the educational interests of the state that the law requires or the board deems important;

(11) Require from the chief officer of each division of the department of elementary and secondary education, on or before the thirty-first day of August of each year, reports containing information the board deems important and desires for publication;

(12) Cause fifty copies of its annual report to be reserved for the use of each division of the state department of elementary and secondary education, and ten copies for preservation in the state library;

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100-C (C)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education of the City of St. Louis, Missouri, et al.,
Defendants.

MEMORANDUM

On December 15, 1980, the State of Missouri submitted a plan pursuant to paragraph 12(a) of the Court's Order of May 21, 1980. The Court has examined the plan as well as the joint report filed by the United States and the Board of Education of the City of St. Louis.

This Court is well aware of the problems encountered by the Board of Education of the State of Missouri attempting to obtain the voluntary cooperation of the County school districts in a plan which would assist in the desegregation of the City schools. The Court is also aware that the State of Missouri has appealed the orders of this Court; arguments on these matters have been heard by the United States Court of Appeals for the Eighth Circuit. However, the fact remains that the Court of Appeals for the Eighth Circuit has found that the State of Missouri as a matter of law has a duty to eliminate segregation in the schools of this State. That Court also suggested to this Court that an effort be made to work out a voluntary plan of integration within the County school districts. *See Adams* v. *United States,* 620 F.2d 1277, 1296 (8th Cir. 1980).

It is the opinion of this Court that the plan submitted by the State of Missouri is insufficient for this Court to make a determination as to whether or not it is feasible to pursue further the voluntary avenues of integration with the County schools. Various parties of this suit have indicated that it is their intention to add as parties to this suit a number of the districts in St. Louis County as well as the school districts in Jefferson and St. Charles Counties if a voluntary plan cannot be formulated. In one last effort to promote a voluntary plan, this Court will order the State of Missouri, and particularly the Board of Education for the State of Missouri, to submit another voluntary and cooperative plan on or before February 2, 1981. This plan shall contain the following:

1. The number of students that each district in the County can accommodate caused by the decrease in the number of students between the school years 1979-80 and the beginning of school year 1980-81.

2. Specific details for each district on the number of teachers, available space, and the desirability of its location for students from either the City of St. Louis or other districts within the County.

3. The present racial mixture of each school district in St. Louis County.

4. A plan providing for the interchange of students between the districts of the County in order to achieve more integration, and between the County and the City.

5. Specific recommendations for locations of magnet schools and the manner in which they may be implemented both on a part-time and a full-time basis for students within the County and from the City.

6. Specific financial estimates of costs and the means whereby the plan may be financed. The burden of financing will be borne primarily by the State of Missouri and shall discuss the possibilities of:

a. New legislation;

b. A fiscal incentive bill so that the districts participating will enhance their situation by participating;

c. Money to be taken from surplus of the State and given to the State Board of Education to pay the cost of transportation and additional expenses involved; and

d. Remuneration from the federal government on such plans.

7. Specifics as to the types and locations of magnet schools within the County. The plan should be specific on how the locations have been chosen. Locations shall be chosen in a fashion that would allow students from Jefferson County and St. Charles County to participate in the magnet schools if they desire.

The State of Missouri has a strong, effective Department of Education. It has a great deal of expertise and experience and should experience little difficulty in drawing and implementing a plan of voluntary and cooperative integration which is educationally sound and comprehensive. The Court will be looking forward to its comprehensive report to be filed on February 2, 1981. This report shall assume that each district in the County will participate in the voluntary and cooperative plan. The plan shall encompass every district in St. Louis County.

When the plan is filed on February 2, 1981, it shall also be sent to all parties of this litigation and to every district in St. Louis County as well as St. Charles and Jefferson Counties.

The Department of Education of the State of Missouri shall then contact each district in the County and report back to the Court on March 2, 1981. Included in its report shall be a list of those districts in St. Louis, Jefferson and St. Charles Counties that are willing to participate and the manner in which they are willing to participate. Included also shall be a breakdown for each district of the number of students the district is willing to

receive and the number of students the district is willing to send to other districts, including the race and grade of those students participating. The Department of Education shall also report on those districts which refuse to participate in the plan.

DATED this 19 day of December, 1980.

/s/ J. H. Meredith
United States District Judge

MOTION FILED
SEP 22 1980

No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
and
EARLINE CALDWELL, *et al.*,
and
JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF AMICUS CURIAE, SCHOOL DISTRICT OF THE CITY OF LADUE OF ST. LOUIS COUNTY, MISSOURI, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WITH BRIEF ATTACHED

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and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the Eighth Circuit Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

School District of the City of Ladue is a public school district located in St. Louis County, Missouri, and hereby respectfully requests leave to file, as amicus curiae, the attached brief in support of the State of Missouri's Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals. The grounds for this motion are:

1. The court of appeals' opinions of the February 13, 1981 (Pet. App. A) and March 19, 1981 (Pet. App. B) in *Liddell* v. *Board of Education,* (8th Cir. 1981), both unpublished, affirmed the orders set forth in paragraphs 12(a) and 12(c) of the district court's order of May 21, 1980, as amended. The court of appeal's opinion of February 13, 1981 acknowledges that the paragraph 12(a) and 12(c) orders "arguably" involve the public school districts located in St. Louis County, Missouri, including Movant (Petition at A-14, n.5).

2. Movant's primary concern is that the paragraph 12(c) order threatens Movant's continued existence.

3. Movant did not seek previously to file an amicus curiae brief because on June 23, 1981 the district court ordered termination of further reporting under paragraph 12(c).[1] However on August 24, 1981 the district court entered an order[2] reactivating paragraph 12(c) and granting motions to join as defendants, Movant and other school districts in St. Louis County, Missouri. The court further ordered that the new defendants would be given "a hearing on the 12(c) aspects of this cause, involving both alleged constitutional violations and proposed remedies" on March 1, 1982.

4. Movant was served with process on September 3, 1981 and has diligently worked on the preparation and filing of the attached brief.

5. Movant has presented in its brief reasons for granting the Writ of Certiorari which are not included in other briefs. Movant has endeavored to avoid repetition of arguments previously submitted to the Court in this matter.

---

[1] The Brief For The United States In Opposition states, at p. 16, that the order of June 23, 1981 "is being lodged with this Court".

[2] Pet. Supp. Br. App I.

6. With the service copies of this motion and brief, Movant has mailed to all parties requests for consents pursuant to Rule 42.

WHEREFORE, Movant prays that leave be granted to file the attached brief as Amicus Curiae.

Respectfully submitted,

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Attorney for Movant,
School District of the City of
Ladue of St. Louis County,
Missouri

No. 80-2152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
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JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the Eighth Circuit Court of Appeals

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The interests of the amicus curiae in this case are as stated in the Motion for Leave to file this Brief, *supra*. If the Order of May 21, 1980, as modified by the Orders of September 17, 1980 and December 19, 1980, is allowed to stand, it will have a clear and significant impact upon amicus, School District of the City of Ladue.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to the petition for a writ of certiorari filed by the Petitioners. The opinion of the United States District Court for the Eastern District of Missouri is reported at 491 F. Supp. 351.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 13, 1981 and the Court of Appeals denied petitions for rehearing or rehearing en banc on March 19, 1981. A copy of the order denying the petitions for rehearing appears in Appendix B to the petition for a writ of certiorari filed by Petitioners. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This school desegregation case was begun in 1972, when Craton Liddell, his mother, and other members of the Concerned Parents of North St. Louis and their children ("the Liddell plaintiffs") filed a complaint in the United States District Court for the Eastern District of Missouri seeking to represent the class of school children and their parents in the St. Louis, Missouri public school system. Named as defendants were the St. Louis City Board of Education ("the City Board"), its individual members and certain administrators. Plaintiffs alleged that defendants had "effected and perpetuated racial segregation and discrimination" in the operation of the public schools of the City of St. Louis, in violation of the Fourteenth Amendment.

After approximately one year of discovery proceedings, a class was certified. After some one and a half years of negotiation, the Liddell plaintiffs and the City Board entered into a

consent decree which was approved by the District Court. Objections to the consent decree were filed by organizations representing St. Louis City teachers and by a second group of City students and parents ("the Caldwell group") who were joined by the St. Louis chapter of the National Association for the Advancement of Colored People. At this time, the Caldwell group also moved to intervene as parties plaintiff. The District Court denied the Caldwell group's motion to intervene and they appealed. The Court of Appeals reversed. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976). Although the only issue presented to the Court of Appeals was whether the District Court erred in denying intervention, *id.* at 769, the Court of Appeals stated:

> In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken* v. *Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately drawn on the basis of race. However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked.

Id. at 774 (citations omitted). This Court denied the City Board's petition for a writ of certiorari. *St. Louis Bd. of Education* v. *Caldwell,* 433 U.S. 914 (1977).

By various orders in 1977, the United States, the City of St. Louis, Janice Adams (representing the Concerned Parents for Neighborhood Schools), and Mary Puleo (representing the In-

volved Citizens Committee) were allowed to intervene as plaintiffs. Also during this time, the State of Missouri, the Commissioner of Education of the State of Missouri, and the State of Missouri Board of Education and its individual members were added as parties defendant.

The case proceeded to trial on questions of both liability and remedy. On April 12, 1979, the District Court rendered its decision and found no constitutional violation by any of the defendants. *Liddell* v. *Board of Education of St. Louis,* 469 F. Supp. 1304 (E.D. Mo. 1979) On appeal, the Eighth Circuit reversed and found that the City Board had failed to disestablish the dual school system it had maintained prior to this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Specifically, the Court of Appeals held:

> The dual school system in St. Louis legally mandated before 1954 and perpetuated by the Board of Education's 1954-1956 desegregation plan, has been maintained and strengthened by the actions of the Board in the years since. The Board's steadfast adherence to a student assignment policy which did not desegregate the schools and its use of intact busing, school site selection, block busing, permissive transfers, and faculty assignments have preserved segregation in the school system.

Adams v. *United States,* 620 F.2d 1277, 1288 (8th Cir. 1980) (en banc).

Although the only question before the Court of Appeals was whether the City Board had effectively created and operated a unitary school system within the City of St. Louis, the Court of Appeals commented:

> Dr. Orfield [an expert witness testifying for the United States] agreed with the Board of Education that an interdistrict remedy funded by the State of Missouri would have

> the best chance of permanently integrating the schools in the metropolitan St. Louis area.[27]

Id. at 1294-95 & n. 27 (citations omitted).

The Court of Appeals remanded the case to the District Court and ordered that the City Board submit a desegregation plan to the District Court and that, after a hearing, a desegregation plan was to be implemented in the City of St. Louis no later than the beginning of the 1980-81 school year. *Id.* at 1295. Only the

---

[27] Dr. Orfield testified:

> [T]he most stable kind of plan is a metropolitan-wide proportional enrollment plan * *.
>
> * * * * * * * *
>
> Anything that can be done to involve the suburban districts should be done.

In *Milliken* v. *Bradley*, 418 U.S. 717, 744-745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974), the Supreme Court stated that, in order for an inter-district remedy to be appropriate,

> it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

St. Louis County suburban school districts, pursuant to state law prior to *Brown*, collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools. *See* Act of April 9, 1917, 1917 Mo. Laws 498 (repealed 1957) (providing for the "Colored Consolidated High School District" of St. Louis County); Act of February 17, 1865, § 13, 1865 Mo. Laws 170 (repealed 1957) (providing, *inter alia*, for the inter-district transfer of "colored children"). Included among the pre-*Brown* practices of these districts was the assignment and transportation of black students living in the suburbs to black schools in the City. Moreover, as noted in Part VI of this opinion, governmental policies may have intensified segregation in the St. Louis area.

Adams plaintiffs filed a petition for a writ of certiorari, which this Court denied. *Adams* v. *United States*, ____ U.S. ____, 101 S. Ct. 88, 66 L. Ed.2d 29 (1980).

The City Board timely submitted to the District Court its plan for desegregation of the St. Louis City public schools. On May 21, 1980, the District Court approved the plan, with minor modifications. *Liddell* v. *Board of Education*, 491 F. Supp. 351 (E.D. Mo. 1980). In paragraph 12 of its order approving the plan, the District Court stated:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.
>
> b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.
>
> c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F. Supp. at 353.

The District Court then addressed the liability of the State of Missouri and various state officials and agencies and concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected.

Id. at 360. The Court ordered the State to fund one-half of the desegregation budget, up to a maximum of eleven million dollars.

The State of Missouri and three parent groups appealed from the District Court order. The State of Missouri challenged the above-recited provisions of paragraph 12 of the District Court's May 21, 1980 order and argued that the District Court was without authority to order the preparation of interdistrict desegregation plans unless and until the affected school districts in St. Louis County are joined as parties to the lawsuit. The Eighth Circuit rejected this argument and affirmed, finding that the interdistrict plan called for by a paragraph 12(a) was permissible because it is "voluntary" and that the interdistrict plan called for by paragraph 12(c) was permissible "to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation." *Liddell, et al.* v. *Board of Education, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599, and 80-1735 (8th Cir. February 13, 1981) (Petition at A-15 to A-16).

While the appeal before the Eighth Circuit was pending, the Caldwell group and the City Board each filed motions in the District Court for leave to amend their pleadings to assert claims for interdistrict desegregation relief against some 40 separate and autonomous school districts in suburban St. Louis, St. Charles, and Jefferson Counties.

Also during the pendency of the appeal, the District Court modified paragraph 12(a)-(c) of its May 21, 1980 order to extend the time for filing the plans required to be submitted. In addition, the following paragraph was added to paragraph 12(c):

> On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, *and should specifically include pupil assignment and administrative reorganization provisions.* (Emphasis added).

Petition at A-43.

By order of March 4, 1981, the District Court compelled the State Defendants to prepare a "voluntary" interdistrict plan pursuant to paragraph 12(a) of the District Court's May 21, 1980 order within 60 days or face the possibility of being held in contempt of court. Further, the District Court said that if the "voluntary" plan is not submitted, "[t]his Court will be left no alternative but to adopt a plan *to remedy the effects of constitutional violations.*" Petition at A-59 to A-60 (emphasis added).

On May 4, 1981, the City Board and the United States Department of Justice filed a joint plan for voluntary interdistrict desegregation and the State of Missouri filed a similar, but separate, voluntary plan.

On May 11, 1981, hearings were begun on the issues relating to the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the City Board. The parties have presented a consent decree relating to the Special School District and paragraph 12(b), the terms of which have been approved by the District Court as a vocational plan under paragraph 12(b). Petition at A-65 *et seq.*

On July 2, 1981 Judge Hungate ordered the implementation of a voluntary interdistrict desegregation plan beginning with the start of the 1981-1982 school year. He gave all school districts in the metropolitan area until August 6, 1981 to declare their intentions regarding participation. (Petr. Supp. Br. App. G).

On July 31, 1981 the suburban Kirkwood School District R-7, the first of four suburban districts to conditionally agree to participate in Judge Hungate's plan, filed its conditional agreement to participate in the July 2, 1981 Voluntary Desegregation Plan, stating as one of its reasons for doing so:

> 3. If participation by the District would decrease the possibility of a mandatory plan or other court order adverse to this District, it would be to the advantage of this District to become a participant. (App. A).

On August 24, 1981 Judge Hungate ordered the four suburban school districts which had conditionally agreed to the Judge's voluntary interdistrict plan, to implement that plan as a pilot project. Pending motions to make these districts party-defendants, and motions relating to discovery were stayed only as to these districts for as long as they "participated in good faith to achieve a level of integration satisfactory to the Court." (Petr. Supp. Br. App. H). Two days later a fifth suburban school district was admitted to the voluntary plan and the protections provided thereto, upon its written argument to the

Court that its conditional rejection of the voluntary plan was comparable to the conditional acceptance of that plan by one of the four other districts admitted to the plan.

In another order dated August 24, 1981, Judge Hungate said:

> To foster voluntary, cooperative planning under paragraph 12(a) of Judge Meredith's order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit, this Court deferred ruling on the separate motions of the City Board and Caldwell (to file cross claims against and add the suburban school districts as defendants). (Petr. Supp. Br. App. I).

Continuing on in this August 24, 1981 Order, the Judge referred to the fact that only four suburban St. Louis County school districts conditionally agreed to participate in the paragraph 12(a) voluntary plan, and said:

> In light of the overwhelming rejection of the 12(a) voluntary plan, the Court is compelled to begin proceedings on a mandatory interdistrict plan pursuant to paragraph 12(c) . . . *On February 13, 1981, the United States Court of Appeals for the Eighth Circuit affirmed this Court's power to order a mandatory interdistrict remedy.* (Emphasis added).

* * * *

Expressly

> [f]or purposes of Judge Merdith's directive in paragraph 12(c) to develop a compulsory interdistrict remedy:

Judge Hungate ordered that (1) the motions of the Board of Education for the City of St. Louis and the Caldwell plaintiff group to file crossclaims against and to join as parties defendant seventeen school districts in the County of St. Louis, including the School District of the City of Ladue, "which are necessary parties for a complete determination of this lawsuit under

paragraph 12(c) of Judge Meredith's Order dated May 21, 1980, as affirmed by the United States Court of Appeals for the Eighth Circuit", be granted, (2) discovery was to be completed within ninety days "except for good cause shown", (3) the State defendants, the United States, and the St. Louis Board of Education were:

> To develop and submit to the Court by February 1, 1982, a suggested plan of inter-district school desegregation necessary to *eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.* (Emphasis added),

and (4) a hearing "on the 12(c) aspects of this cause, involving both alleged constitutional violations and proposed remedies" was set for March 1, 1982. (Petr. Supp. Br. App. I).

Judge Hungate introduced his August 25, 1981 Order containing instructions to his court-appointed experts with this preface:

> To provide expert assistance to this Court in developing *and implementing* a mandatory, inter-district desegregation remedy pursuant to paragraph 12(c) of Judge Meredith's order dated May 21, 1980, as amended, and as affirmed by the United States Court of Appeals for the Eighth Circuit. (Emphasis added)
>
> IT IS HEREBY ORDERED that the educational experts appointed by the Court on August 1, 1981 . . . be and they are directed to begin assembling data necessary for devising a mandatory interdistrict remedy pursuant to paragraph 12(c) for presentation to the parties for implementation in the 1982-83 school year.
>
> IT IS HEREBY ORDERED that on or before September 7, 1981, the experts shall file a proposed timetable for outlining the broad parameters of a 12(c) mandatory inter-

> district plan. The framework shall be submitted to the Court before the expiration of their 90-day appointment, November 16, 1981. (Petr. Supp. Br. App. J).

On September 3, 1981, the United States of America moved to strike the aforesaid portion of Judge Hungate's August 24, 1981 Order which sought to implement paragraph 12(c) of Judge Meredith's May 21, 1980 Order by directing the State defendants, the United States, and the St. Louis Board of Education

> To develop and submit to the Court by February 1, 1981, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

The United States argued that "it is unclear as to what, if any, "government-imposed" segregation 12(c) plans are to be addressed." The United States explained that prior to May 21, 1980, it had opposed the initial paragraph 12(c) language because, *inter alia,* "there did not exist a sufficiently comprehensive predicate of court findings of interdistrict violations or interdistrict effects of intradistrict violations to justify an area wide plan of interdistrict relief." (App. B).

The State of Missouri and the various individual defendants who are officials of the State of Missouri (collectively, "the State Defendants") have filed a petition for a writ of certiorari to review the Eighth Circuit's decision.

REASONS FOR GRANTING WRIT

1. The Decision Below Raises Issues of Great Importance Regarding the *Exercise of Post-Remedial Jurisdiction By Lower Federal Courts.*

Post-remedial guidelines are of historic importance to this court. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 5, 6(1971). This Court has said that once liability is determined, the district court must develop and implement a constitutionally acceptable plan, and must retain jurisdiction to insure that the plan is operated in a constitutionally permissible fashion. *Raney* v. *Board of Education of Gould Sch. Dist.,* 391 U.S. 443, 449 (1968). The retention of jurisdiction is also needed to protect the operation of the plan from interference not only from its participants but also from third parties. *Griffin* v. *County School Bd. of Prince Edward County,* 377 U.S. 218 (1964).

Here, however, the lower courts have taken a far differenct view of the district court's power following adoption of a constitutionally acceptable intradistrict desegregation plan.[1] Here

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[1]The Courts' approach appears to have had its genesis in the court-appointed expert's conclusion that the most stable plan would be a metropolitan wide plan involving suburban school districts. *Adams* v. *United States,* 620 F.2d. 1277, 1294 (n. 27) (8th Cir. 1980). Seemingly with Dr. Orfield's conception of the "ideal" plan in mind, the Court of Appeals *suggested* to the City Board the development and implementation of an interdistrict student exchange and transfer program in cooperation with the suburban school districts of St. Louis County, the State Board of Education and the United States. *Adams,* 620 F.2d. at 1296. Obviously the *most* stable plan would be a statewide plan. Flight would result only by entry in private school or by departure fro[illegible] the state. However, stability is not the equivalent of constitutionality, and this Court has indicated that constitutional desegregation plans do not have to protect against future demographic instability in the urban area. *Swann,* 402 U.S. at 31, 32.

the court ordered the implementation of a plan to cure intradistrict segregation found to exist in the City Schools but at the same time exceeded its continuing jurisdiction by ordering in paragraphs 12(a) and 12(c) of the May 21, 1980 Order the preparation of plans involving the school districts of St. Louis County.[2] Evidently the lower courts believed that the intradistrict plan of desegregation could be made more constitutional or better through the introduction of white county school children into the North St. Louis City Schools which, because of the small number of white students attending the City Schools, remain virtually all black. This Court has never indicated its willingness to sanction such methods to improve upon already constitutionally sufficient plans of desegregation.[3]

We are not aware of any other case in which this novel and unchartered course of action undertaken by the lower courts in this case has been attempted.[4] We strongly urge this Court now

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[2]The Court of Appeals approved these orders apparently based on that court's view that the constitutional intradistrict plan does not offer an "optimal" degree of actual integration, and the 12(a) and 12(c) orders were essential to provide more integration with a more constitutional plan. (*Liddell*, Petition A-11).

[3]This Court's decision in *Milliken* v. *Bradley* (I), 418 U.S. 717 (1974) establishes that the federal courts have no obligation to seek out remedies involving areas beyond the boundary lines of a predominately black urban school district in order to find and put into operation a constitutionally acceptable desegregation plan for that urban district. And *Milliken* (I) makes clear that a finding of intradistrict liability against the State does not impose any such obligation on the federal courts. Furthermore, *Swann*, 402 U.S. at 24, tells us that racial balancing is not a necessary ingredient of a constitutionally acceptable desegregation plan.

[4]These orders in effect constitute an invitation to the filing of claims seeking an interdistrict remedy because they announce that the federal court believes an interdistrict remedy is needed. The Order of August 24, 1981 (Pet. Supp. Br. App. I) joining with paragraph 12(c) the interdistrict claims alleged in the amended pleadings of the Board of Education of the City of St. Louis and the Caldwell plaintiffs-

to determine whether that course of action is within the power of the federal courts in an intradistrict desegregation case following the adoption and placement into operation of a constitutionally acceptable intradistrict desegregation plan.[5]

2. The Decision Below Raises Questions of Exceptional Importance Regarding *Federal Court Interference With the Affairs of Local School Districts.*

This Court has repeatedly cautioned the lower federal courts in desegregation cases about the exercise of power over public schools and their affairs. Such power can be invoked only after the finding of a constitutional violation, *Swann,* 402 U.S. at 16; *Milliken* v. *Bradley* (II) 433 U.S. 267, 282 (1977); *Hills* v. *Gautreaux,* 425 U.S. at 293. While paragraphs 12(a) and 12(c) of the District Court's May 21, 1980 Order compel no action by the suburban school districts, it is a travesty to say they are

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intervenors suggests that the district court recognized that the court could not proceed under 12(c) without such claims. Furthermore, the orders suggest a prejudgment by the lower courts on that issue because there was no discernable basis in the *Liddell* record for concluding that an interdistrict remedy would be appropriate and constitutional.

[5]Some of the parties in this case take the position that *Hills* v. *Gautreaux,* 425 U.S. 284 (1976), supports the imposition of a remedy beyond the geographical area (City of St. Louis) in which the violation occurred because the State of Missouri, along with the City of St. Louis school district, was found responsible for failing to dismantle the dual system in the City. There are many reasons that *Hills* is inapposite here, but the definitive reason is that in *Hills* no remedy short of the one there in question had been found to be constitutional. In this case, an intradistrict remedy has been found to be constitutional.

unaffected.[6] In the face of paragraphs 12(a) and 12(c), the suburban districts have been forced to expend large sums of public funds to ascertain how they are affected and what their rights are in this procedurally shocking case. Boards of education, administrators and school attorneys have had to divert enormous amounts of time to these issues, and the order has generated much community dissension and disharmony. Furthermore, the respect which school district constituents have for the courts was understandably shaken when a plethora of court orders requiring suburban interdistrict desegregation planning for their school districts preceded rather than followed any trial of their district. The judicial system, they believed, was not supposed to work that way.

There has also been a blatant effort on the part of the district court to use the threat of the imposition of a mandatory interdistrict plan to force the county school districts to accept the court's July 2, 1981 voluntary plan under paragraph 12(a). This deplorable attempt met with some success, but that success was achieved only because the court afforded the five volunteering districts some immunity from mandatory interdistrict proceedings. (Pet. Supp. Br. App. H).

This flagrant interference of the lower court with the affairs of the St. Louis County School Districts has been done without a finding against the local county districts of any constitutional

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[6]By either version of paragraph 12(c), a plan is required which assumes the existence of violations on the part of the suburban districts. The May 21, 1980 version calls for the eradication of "the remaining vestiges of government imposed school segregation in the City of St. Louis and St. Louis County." The September 17, 1980 version calls for specific pupil assignment and administrative reorganization. Thus without their having been ordered to do anything, the very existence of the suburban school districts is threatened. Furthermore, the Court of Appeals has recognized that these orders involve the suburban school districts. *Liddell,* (Petition at A-14, n.5).

violation and without a finding against the State of an interdistrict violation.[7]

CONCLUSION

We submit that the foregoing establishes the necessity of limiting the post-remedial jurisdiction in intradistrict school desegregation cases (absent appropriate pleadings, hearings and findings on interdistrict violations) to the protection and supervision of a constitutionally acceptable intradistrict desegregation plan. Federal judges who are of the opinion that a constitutional intradistrict plan for a predominately black urban school district will not provide optimal integration, and who therefore conclude that interdistrict remedies are desirable, should not be able to invoke the awesome federal judicial system to "persuade" the metropolitan community to become involved in interdistrict remedies. Absent the finding of an interdistrict violation, the matter of providing the inducement and mechanism for interdistrict student transfers should be left to the state's legislature, which has the obligation for providing free public education under Article IX, Subsection 1(a) of the Missouri Constitution.

Respectfully submitted,

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[7] *Hills* would not give the district court power to compel the State of Missouri to comply with the paragraph 12(c) order because that order contemplates substantial interference with, if not complete elimination of the suburban school districts.

APPENDIX

APPENDIX A

In The United States District Court
For The Eastern District Of Missouri
Eastern Division

Cause No. 72-100-C(4)

Craton Liddell *et al,*
Plaintiffs,

vs.

The Board Of Education Of
The City Of St. Louis, Mo.,
et al,
Defendants.

Conditional agreement to become a participating district during the school year 1981-82 in "An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri, Metropolitan Area" as approved by the Court in its order of July 2, 1981

Kirkwood School District R-7, subject to the disclaimers herein expressed and acceptance by the Court of the conditions to participation set forth below, hereby agrees during the school year 1981-82 to become a participant under "An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri, Metropolitan Area", as approved by the Court on July 2, 1981.

Following the decision of the Supreme Court of the United States in *Brown* v. *Board of Education (1954),* Kirkwood School District R-7 promptly proceeded to abandon

maintenance of separate schools for its black and white students, as required by Missouri law, and established a neighborhood school system whereby students were required to attend schools serving the attendance areas where they resided. Subsequent "affirmative action", by "pairing" schools, closing schools, redrawing attendance areas, assignment of students and intra-district busing, has made this District a truly integrated district. As demographic changes have occurred for reasons completely beyond the control of this District, it has made adjustments, beyond those required by federal law, to attempt to maintain a racial balance in its schools.

Therefore, this District believes it has a "unitary" district which more than meets the requirements of federal law.

Furthermore, no actions of this District, either before or after the decision in *Brown*, have in any way contributed to the segregation of races in the School District of St. Louis, Missouri.

For these reasons, this District believes that it should not and cannot be compelled to take any action in relation to the problems of segregation in the schools of the School District of St. Louis.

In any event, because it is not a party to the pending case out of which came the Court's order of July 2, 1981 approving said Plan, this Court, at this time, has no jurisdiction over this District. Participation by this District under said plan shall not be regarded as submission by this District to the Court's jurisdiction in the case in its present posture.

Even if this District were to be made a party to the pending action, or if a new suit were filed naming this District as a party Defendant, no legally effective order could be directed against this District until and unless there shall have been hearings during the course of which this District could defend against the charges and produce evidence in support of its position.

For all of the foregoing reasons, this District believes that any participation it may agree to do under the Plan will be strictly voluntary and that, in participating, it does not subject itself to the jurisdiction of this Court or to any orders which may have been, or may hereafter be, entered by this Court, unless and until this District is made a party to this action or to some other action.

Notwithstanding the foregoing, there are reasons why this District is willing to voluntarily become a participant in the Plan, subject to the disclaimers and conditions herein set forth. Among such reasons are the following:

1. The Board of Education believes that, by thus becoming a participant, there may well be educational advantages to the students of this District, without any additional net cost to this District, or negative impact on our current educational program. What this means is that there will be opportunity to offer educational programs in other districts not now available to our students and opportunity to retain programs within our district that would otherwise to lost due to declining enrollment.

2. If participation by this District would relieve it of the further expenditure of money, time and energy in litigating these issues over an indefinite number of years, it would be to the advantage of the District to become a participant.

3. If participation by the District would decrease the possibility of a mandatory plan or other court order adverse to this District, it would be to the advantage of this District to become a participant.

The conditions on which this District is willing to become a participant, the acceptance of which conditions are a prerequisite to our participation, are as follows:

1. The pending motions to make this District a party defendant in this case would be denied or withdrawn, and any new

litigation which might be filed seeking substantially the same remedy, would be stayed against this District.

2. The effective date of Section III of the Plan (Permissive, Inter-District Transfers to Existing Programs) shall be deferred until after the beginning of the first semester of the 1981-82 school year and shall be accomplished by the beginning of the second semester of said year. There is simply no practical way that this part of the plan can be effectively in place by the opening of the school year 1981-82 and such deferment would enhance its prospects of success.

3. Because this conditional acceptance is based on the Plan as approved by the Court, and because the Court has expressly reserved the right to make changes in the Plan, this District must have the right to withdraw from participation promptly after any modification of the Plan deemed by this District to be substantially disadvantageous to it, as for example, a change in the cost of reimbursement provisions, provided written notice of withdrawal is given within thirty (30) days of such change in the plan. This would be a way of withdrawing in addition to the provisions of the Plan which permit withdrawal for the following school year, provided notice shall have been given prior to March 1 of the current school year.

4. This District would retain the right to limit its acceptance of inter-district transfer students to 50 students the first year, preferably 10 students in each grade level 6 through 10, and, thereafter, one percent of the student enrollment of the District each year until the Plan ratio is reached, even if under the Plan the District were deemed to have space available for a larger number of such students.

The Meacham Part area is and has been an almost totally black residential area within this school district. Recently a new federally subsidized housing project has been constructed in this same area. This new housing likewise is substantially all black

occupied. As a result, within the past three years the district has experienced a substantial increase (from 11.78% to 16.4%) in its black student population which it is still in the process of successfully integrating into its school community. An additional influx of black students beyond the fifty students referred to above could jeapordize all of our positive efforts toward district-wide integration and therefore would be unacceptable to the District.

5. The District shall remain free to close and sell its school buildings and other properties when, in its sole discretion, it has concluded that they are no longer needed for the education of the District's resident students and whose closing and sale would result in a significant financial advantage to the District.

6. In agreeing to become a participant in this Plan, the Kirkwood School District R-7 recognizes the distinction between its voluntary nature and mandatory forced busing to achieve redistribution of students by race. We will oppose action on the part of this court or any other agency of government at any level and will defend our students and parents against any action leading to mandatory busing to the fullest extent. Further, should this district become convinced that participation in this voluntary plan would increase the likelihood of becoming involved in forced busing of students, it reserves the right to terminate such participation.

Respectfully submitted,

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APPENDIX B

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Civil Action No. 72-100C (4)

Craton Liddell, *et al.*,
Plaintiffs,

v.

The Board of Education of the City of
St. Louis, Missouri, *et al.*,
Defendants.

Motion of the United States to Modify Order H(337)81

On August 24. 1981, this Court entered an order (H(337)81) which, *inter alia,* provided that

> IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.
>
> Order H(337)/81 at 5.

The United States moves the court to alter Order H(337)/81 by either striking the above quoted provision entirely or, in the

alternative, by modifying the language to reflect the changes made in the Court's May 21, 1980, order by this Court's order of September 17, 1980. The United States requests oral argument on this motion.

Respectfully submitted,

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United States Attorney

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/s/ Craig M. Crenshaw Jr./ss
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In the United States District Court for the
Eastern District of Missouri
Eastern Division

Civil Action No. 72-100C (4)

Craton Liddell, *et al.*,
Plaintiffs,

v.

The Board of Education of the City of
St. Louis, Missouri, *et al.*,
Defendants.

Memorandum in Support of Motion of United States to Modify Order H(337)81

On August 24, 1981, this Court entered an order (H(337)81) which, *inter alia,* provided that

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

> To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.
>
> Order H(337)/81 at 5.

The United States has moved to alter Order H(337)81/ by striking the above quoted provision in its entirely or, failing that, in the alternative, to modify the provision to reflect the changes made in the Court's May 21, 1980, Order by this Court's order of September 17, 1980. This memorandum is submitted in support of that motion.

Statement

The above cited provision parallels paragraph 12(c) of this Court's order of May 21, 1980. At several conferences last summer with the court, the United States and the City Board (both of which had originally opposed the inclusion of pararaph 12(c)) expressed reservations about paragraph 12(c), resulting in a letter to counsel dated September 5, 1980, from Judge Meredith. Pursuant to that letter, counsel met with the Court and produced the order of September 17, 1980, which modified several dates and the terms of paragraphs 12(a) and 12(c).* The September 17, 1980, order modified 12(c) by striking the language of the original 12(c) and substituting therefore the re-

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* This order was entered without objection from counsel for any party as to the modifications no party appealed this modification of paragraph 12.

quirement that the City Board and the State (but not the United States) present a "feasibility plan" of inter-district school desegregation. Through an apparent error in the Court of Appeals clerk's office the September 17, 1980, order was not included in the record on appeal although it had been designated. The issue of the change in the terms of 12(c) was not briefed. Because of this the Court of Appeals in its February 13, 1981, opinion (at slip pp. 19-20) considered the original language of paragraph 12(c) even though that language had been superceded in the interim. The Court of Appeals noted that it read the term "government-imposed" in 12(c) to mean found by a court to have been "government-imposed" by the State or other defendants.

On February 27, 1981, Cadlwell, who had been one of the original advocates of 12(c), moved this Court to "terminate" further reporting under 12(c). On June 23, 1981, this Court granted that motion although it retained jurisdiction to enter 12(c) "related" orders. Finally this Court on August 24, 1981, *sua sponte,* reinstated the long discarded formulation of paragraph 12(c) as contained in the May 21, 1980 order.

Argument

The United States urges the Court to delete the resurrected 12(c) language in its entirety. Failing that, the Court should adopt the modified language of 12(c) which the Court endorsed on September 17, 1980. The rationale for each action is separate and independent.

1. Prior to the May 21, 1980, order the United States took the position that the initial 12(c) language was inappropriate, because, among other reasons, there did not exist a sufficiently comprehensive predicate of court findings of interdistrict violations or interdistrict effects of intradistrict violations to justify an areawide plan of interdistrict relief. The Eighth Circuit in affirming the 12(c) provisions of the May 21, 1980 order added the gloss that it was only as to that "government imposed" segrega-

tion which had been found *by a court* to have been government imposed that 12(c) was addressed. The basic problem here is that it is unclear as to what, if any, "government imposed" segregation 12(c) plans are to be addressed. Without further explicit direction from the Court we are drawn again to the conclusion reached last September, *viz.*, 12(c) as presently constituted cannot be executed. Therefore it should be deleted until this Court has made explicit findings, after appropriate hearings, as to what, if any, constitutional violations are meant to be extirpated by 12(c).

2. Alternatively, if the Court wishes to adopt the formulation of 12(c) as expressed in the Court's September 17, 1980 order then we stress the necessity of eliminating the United States from the reporting provision. The reasons for this are twofold. First in a normal case, a modification of a Court order assented to by each party and ratified by the court would not unilaterally be set aside by the court eleven months later absent some finding relevant to the issue, expecially without prior notice and an opportunity to be heard. Here, there have been no such findings or an opportunity to be heard.

The second reason why the Court should not require the United States to file a 12(c) plan is that the Court has no authority to do so absent the assent of the United States. Under the Court's findings, if any obligation exists to develop a 12(c) plan — which we dispute — it is an obligation of the State's and/or the Board's. While the United States is always available to assist the Court upon request and has done so upon many occasions in this case, this is not the same thing as being required by order to do that for which there is no support in the record. Nor is the United States currently seeking a mandatory interdistrict remedy. Without one of these predicates, we believe that the United States should not be required to participate in the formulation of a 12(c) plan.

Conclusion

For the foregoing reasons, we respectfully request the Court to strike the language in question, or at a minimum, modify the requirements pursuant to this Court's earlier order of September 17, 1980 which *inter alia* deleted any requirement of United States participation in 12(c) planning.

Respectfully submitted,

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WM. BRADFORD REYNOLDS
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MOTION FILED
SEP 25 1981

No. 80-2152

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

CRATON LIDDELL, ET AL., and EARLINE CALDWELL, ET AL., and JANICE ADAMS, ET AL., and BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., and the CITY OF ST. LOUIS, MISSOURI, and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME; AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The general questions presented by the petition are most important. NKCSD submits, however, that, because of widespread public interest in mandatory busing and metropolitan cases, additional important questions inhere in this case including:

A. Did the courts below, in an intra-district case, properly apply the test announced in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) by ordering an inter-district remedy without any evidence of inter-district violations?

B. Can an inter-district remedy be imposed on the Special School District of St. Louis County without a finding that they have been affected by an inter-district violation?

C. In light of *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), can the State of Missouri, which has been shown only to have committed an intra-district violation, be compelled to develop, implement and fund an inter-district desegregation plan?

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No. 80-2152

In the Supreme Court of the United States

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STATE OF MISSOURI, ET AL.,
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vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME

North Kansas City, Missouri School District ("NKC-SD"), pursuant to Sup. Ct. R. 42, requests leave to file the attached *amicus curiae* brief supporting the State of Missouri's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Counsel for the State of Missouri has consented to the filing of this brief and will submit a written confirmation to the Court. Counsel for respondents were telephoned in an

effort to obtain their consent, but they were presently unavailable and have not yet returned messages left by counsel for the *amicus*. Accordingly, the *amicus* asks the Court to exercise its discretion to permit the filing of the *amicus* brief along with the other *amicus* briefs already on file which were consented to by respondents.

It is respectfully submitted that the untimeliness of this *amicus* brief was dictated by, and should be considered in light of, the orders entered by the United States District Court for the Eastern District of Missouri on August 24, 1981 and September 21, 1981 (attached as Appendix A). The latter order was brought to the *amicus'* attention the night of September 22, 1981. This brief was drafted and submitted to the printer on September 23, 1981. These extraordinary orders, construing the February 13, 1981, opinion of the Eighth Circuit Court of Appeals, compel development and implementation of an inter-district desegregation plan in a case where the only violation established, and indeed the only evidence presented, was intra-district.[1] The recent orders of the dis-

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1. As contended by the Solicitor General, it was at one time arguable that the Eighth Circuit Court of Appeals, rather than imposing an inter-district remedy, was merely suggesting that one be explored. If this were the case, it may well be that presenting an inter-district issue to the Court was premature. Parenthetically, it can be noted that the Court of Appeals committed a serious error by injecting inter-district remedies into the case no matter what the original intent of the language in its opinion. Nevertheless, as interpreted by the district court, it is apparent that the Court of Appeals was imposing an inter-district remedy on the State of Missouri when it had been found liable only for an intra-district violation. The presence of an inter-district remedy without an inter-district liability hearing is no longer premature. Given the procedural history of this case, it is a foregone conclusion that an inter-district remedy will be ordered. One cannot ignore the reality that whatever future hearings may be held, they will be a sham.

Surely, the August 24, 1981 and September 22, 1981, orders of the district court have persuaded the Solicitor General that

(Continued on following page)

trict court have given life to the Court of Appeals' gratuitous and unjustified suggestion that an inter-district remedy be imposed in this intra-district case. What was once a possibility has recently been made a shocking reality, and the resulting breakdown in fundamental fairness and disregard for established substantive law compels this *amicus* to offer its views.

INTEREST OF THE AMICUS CURIAE

NKCSD is located in Clay County, Missouri, immediately north of the Missouri River. Currently, there are some 17,000 students, all of whom live north of the Missouri River, enrolled in grades K-12 in NKCSD. The tax base of NKCSD is defined by the geographical borders of the district. The affairs of NKCSD are conducted by elected members of a board of education.

The Kansas City metropolitan area includes six counties and numerous municipalities located in both the State of Missouri and the State of Kansas, which is a rapidly growing area of affluent, middle-class residential housing.

NKCSD and the State of Missouri are defendants[2] in a so-called metropolitan desegregation case pending in

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Footnote continued—

the Court of Appeals improperly imposed an inter-district remedy. *Amicus* finds interesting the position of the Justice Department, as evidenced by the September 22, 1981, order of the district court, when contrasted with that of the Solicitor General in his *amicus* brief. Moreover, the residents and pupils attending schools in the nonparty suburban districts would find the "premature" distinction urged by the Solicitor General to be a distinction without meaning. Certainly, the premature concept is illusory to those who had no day in court.

2. Defendants in the Kansas City case include 12 other Missouri suburban school districts from four different Missouri counties (all of the school districts have been historically separate from the Kansas City, Missouri School Districts), the United

(Continued on following page)

the United States District Court for the Western District of Missouri styled *Black, et al. v. State of Missouri, et al.*, No. 77-0420-CV-W-1-3. As aptly stated by United States District Judge John W. Oliver, the original judge assigned to the *Black* case, "In essence, plaintiffs seek to create by federal court order a Greater Kansas City metropolitan school district, with jurisdiction over Missouri and Kansas children in several school districts in each of these states, presumably to be run by this federal court."

The briefs on file do not adequately alert the Court to the fact that the legal principles established in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) are not being followed by the courts below. The proceedings in the St. Louis case are a *deja vu* of those renounced in *Milliken I*, and are an egregious example of denying the various school districts their fundamental due process rights.

Footnote continued—

States of America and the Departments of Transportation and Housing and Urban Development. The State of Kansas and several Kansas school districts (one of which was already involved in a desegregation case pending in the United States District Court of Kansas) from two different Kansas counties were earlier dismissed for lack of jurisdiction. The other school district defendants in the Kansas City case are aware of this *amicus* brief but time did not permit their joinder. Naturally, all such school districts do not wish to have their due process rights affected by the deprivation of such rights that has occurred in the St. Louis case. These school district defendants believe that regardless of the St. Louis case, no inter-district liability exists in Kansas City and no inter-district remedy could be justified on the facts that will be developed in the Kansas City case. Rather, such a plan would render havoc to public education in the Kansas City area. Massive busing of thousands of students over hundreds of square miles of diverse geographic areas would be required and, at the same time, white flight would dramatically increase to the growing and affluent residential areas of Johnson County, Kansas. Local control of education would be irretrievably lost and public schools on the Missouri side of the state line would ultimately be left with low income minority students whose parents could not afford private schools or a move to the more affluent residential areas in the State of Kansas.

A fair-minded analysis of the proceedings to date leads to the inescapable conclusion that the tragic and disruptive manner in which public education has been dealt with in the St. Louis case has resulted in an injustice to hundreds of thousands of persons. The district court's orders of August 24 and September 21, 1981, relative to construction and implementation of the February 13, 1981, order of the Court of Appeals demonstrate a rare example of judicial proceedings that ignore fundamental due process rights. In this instance, elementary notions of fair play have run aground of and been replaced by proceedings which can only be characterized as abhorent. A more appropriate occasion for this Court's exercise of its supervisory powers over lower federal courts could not be presented.

WHEREFORE, North Kansas City School District moves for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

STINSON, MAG & FIZZELL

By GEORGE E. FELDMILLER
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816-842-8600

DATED: September 24th, 1981.

BRIEF OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

North Kansas City School District ("NKCSD"), as *amicus curiae*, joins the State of Missouri, the petitioner, in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

I. OPINIONS BELOW

The relevant portions of the Court of Appeals' opinion are reproduced in the Appendices to the Petition. The opinion of the Court of Appeals is unreported. Subsequent important orders of August 24, 1981 and September 21, 1981 construing and implementing the Court of Appeals' opinion have been entered by the United States District Court for the Eastern District of Missouri. The former order is reproduced in petitioners' supplemental brief and the latter is reproduced as Exhibit A to this brief.

II. JURISDICTION

The opinion of the Court of Appeals was entered February 13, 1981. A timely petition for rehearing was denied on March 19, 1981. The petition for certiorari was timely filed and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

The applicable constitutional provision is found in the due process clause of the United States Constitution, Amendment V.

IV. STATEMENT OF THE CASE

In the beginning, this case concerned the alleged segregative condition of the St. Louis City School District and whether the State of Missouri or the St. Louis City School Board had committed any acts constituting an intra-district violation which caused that alleged segregative condition. The case was initially tried in that posture, and the only evidence presented was limited to an intra-district violation. On that record, the district court found that no intra-district violation had occurred. Despite this, the Court of Appeals, without any additional evidence and by sleight of hand, reversed the district court and transformed this nine year old case into one involving an inter-district remedy. Upon remand, the district court allowed the proceedings to evolve into an inter-district case being tried in a judicial atmosphere void of any semblance of a fair and deliberative due process procedure. The legitimate rights of heretofore nonparty suburban school districts and the citizens residing in those districts were ignored. It is now a foregone result that inter-district remedies will be ordered no matter what type of hearings are conducted in the future.

As the case is now before the Court, the following facts are clear:

1. The only violations conceivably established and supported by the evidence are intra-district.

2. The St. Louis City School District and the Special School District of St. Louis County have had an inter-district remedy imposed on them.

3. The State of Missouri has been compelled to fund the inter-district remedy imposed on the Special School District of St. Louis County.

4. The State of Missouri has been compelled to develop, implement, and fund an inter-district remedy without the necessary predicate of an inter-district violation.

5. There is currently in effect an inter-district desegregation plan involving the City of St. Louis and five counties who are supposedly participating "voluntarily." This plan is being funded by the State of Missouri.

V. REASONS FOR GRANTING THE WRIT

A. The Decision and Proceedings Below Raise Significant and Recurring Problems Concerning the Proper Application of the Strict Test Articulated in *Milliken v. Bradley* That Must Be Met Prior to the Ordering of Inter-District Remedies.

The petition presents this Court with the case where, despite *Milliken's* strict inter-district tests, an inter-district remedy was ordered in a solely intra-district case. The result of having all but ignored *Milliken* is that substantial ongoing problems of nationwide impact in the conduct of alleged metropolitan cases have been created. Unless other lower courts are more attuned to the legitimate rights of all parties in alleged metropolitan cases, the result of the St. Louis case could create the preconceived notion that mere racial imbalance mandates metropolitan relief without regard to intentional inter-district segregative acts. Indeed, residential patterns other than a result of segregative intent, are explainable on the grounds of economics, social class, personal preferences of blacks and whites and other non-governmental actions. However, the posture of the St. Louis case makes it extremely doubtful whether such underlying facts, even if time was granted to develop

them, would be considered. Certainly, a metropolitan plan is such an extraordinary and drastic remedy that it should be carefully and thoroughly examined prior to implementation and must be limited to the extent of any violation. At the least, a wide-ranging metropolitan plan ought not to be implemented on the perfunctory basis ordered in St. Louis.[1]

The holdings by the Court of Appeals and the district court result in it being well nigh impossible for the St. Louis suburban schools to defend against imposition of a metropolitan remedy. The need to resolve the problems created by such a "cart before the horse" decision is heightened by the discarded rights of those thousands of students attending the suburban schools. The rights of those students are worthy of having the elementary protection of a non-biased hearing.

The serious implications flowing from the inherently unfair practice of ordering inter-district remedies in contravention of *Milliken's* requirement of a prior establishment of significant and intentional inter-district violations require this Court's attention. Also, there is a conflict in the Eighth Circuit's application of *Milliken* when contrasted to *Armour v. Nix,* No. 16708 (N.D. Ga.), *aff'd,* 446 U.S. 931 (1980) (no metropolitan remedy in Atlanta); *Lee v. Lee County,* 639 F.2d 1243 (5th Cir. 1981) (no

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1. The exceptionally important questions posed by the State of Missouri's Petition must be considered against the backdrop of the legal theories used by those self-appointed social architects who have filed alleged metropolitan cases in St. Louis, Kansas City and other areas throughout the country. Those theories are obviously calculated to create an end-run on *Milliken* and to require a metropolitan racial-balance test without regard to intentional acts of segregation by suburban school districts. Throughout the country, advocates of metropolitan plans are seeking ways to expand *Milliken's* purposefully narrow channel for metropolitan plans by rendering illusory the opportunity of suburban school districts to defend themselves.

metropolitan plan is proper for segregation caused without intent to illegally segregate); *Taylor v. Ouachita Parish*, 648 F.2d 958 (5th Cir. 1981) (no metropolitan remedy permissible even though nonintentional acts of government may have contributed to segregated conditions); *Ross v. Houston Independent School District*, No. 10,444 (S.D. Texas 1981) (denial of an attempt to transform the *Houston* case into a metropolitan case by belated efforts to add suburban school districts at the remedy stage of an intra-district case). The Court of Appeals' gratuitous order, construed by the district court to require implementation of an inter-district remedy in this intra-district case, stands in stark conflict with such decisions, thereby requiring this Court's attention.

There is a wealth of recent social science research studies demonstrating that disruptive busing and complex metropolitan plans heretofore judicially mandated were based on wholly inaccurate, highly misleading and overly optimistic social science theories. The reality is that a child, be it black or white, receives a quality education only through local control and parental involvement. Metropolitan plans do not work except to create a lower social and economic orientation in all public schools, and there is no overwhelming support for anything other than strong neighborhood schools among both black and white parents so long as equal opportunity is present. No one wishes to retreat to separate but equal schools or to prevent equal opportunity for all citizens but now is the time for a common sense restatement of the *Milliken* principle so that ill-conceived metropolitan plans can be terminated unless specific, intentional and present segregative purposes and effects are actually shown.[2]

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2. Undoubtedly, part of the problem in this case is caused by the appointment of Mr. Gary Orfield as an expert for the

(Continued on following page)

B. The Inter-District Remedy Imposed on the Special School District of St. Louis County Without a Finding That They Have Been Affected by an Inter-District Violation Is Improper.

Before an inter-district remedy may be imposed "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Milliken I* at 744-45. At best, plaintiffs have established only a violation within the St. Louis City School District. To find a violation broader in scope would be inconsistent with the intra-district theory upon which the case was filed and tried. Plaintiffs presented no evidence on the issue and failed to show that the alleged violation had an effect in the Special District of St. Louis County, or that there was a constitutional violation in the Special District which had an effect in the St. Louis City School District. Any contrary finding is clearly erroneous. To the extent the district court imposed a desegregation plan on the Special District, it exceeded its equitable powers because the remedy is not commensurate with the nature and extent of the only proven violation, and indeed the only violation on which proof was presented. *Id.* at 744.

Footnote continued—

Court. Mr. Orfield is a well-known advocate of metropolitan plans. Yet, recent books and social science studies cast much doubt on claims of residential or school population stability in metropolitan cases. See Wolf, Trial and Error—The Detroit School Segregation Case (1981), for an excellent discussion of the failure of social scientists to present fair and adequate social science opinions and evidence to the courts in the area of desegregation. This engrossing and detailed work by a respected social scientist is a devastating analytical statement against the expansive forced busing required by metropolitan plans. The utility in such plans is difficult to perceive.

C. In Light of *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), the State of Missouri, Which Has Only Been Shown to Have Committed an Intra-District Violation, Cannot Be Compelled to Develop, Implement and Fund an Inter-District Desegregation Plan.

Milliken I makes clear that an inter-district remedy may be imposed upon a school district only if (1) a violation occurring in that district or a violation having a significant segregative effect in that district is established, and (2) that school district is given an opportunity to receive a meaningful hearing before it is made part of an inter-district remedy. In the present case, five school districts are "voluntarily" participating in an inter-district desegregation plan developed and funded by the State of Missouri. If an inter-district remedy is not imposed upon a school district, they are not within the question addressed in *Milliken I*. Although this order ostensibly operates only on a constitutional wrongdoer, the State, the more important question is whether the remedy of an inter-district plan is tailored to the proven violation. Of course, the State quite properly does not concede that it is a wrongdoer. By definition, the proffered remedy far exceeds the violation proven.

If, as held in *Milliken*, local control of education is an important and valued right in our country, the St. Louis suburban school districts cannot be summarily cast aside simply by a finding against the State. Certainly, the intent of *Milliken* to prevent remedies against non-violating local school districts should have prevented the Court of Appeals and the district court from acting as they did here. A proper remedy if a State violation is found could well be limited to the advancement of funds

alone[3] and not uncalled for inter-district remedies against innocent nonparty suburban districts.

Finally, it is improper for the district court to require submission of an inter-district desegregation plan before there is any finding of an inter-district violation. First, such an order is contrary to the spirit and holding of *Milliken*. Second, it is impossible for the State to develop intelligently such a plan. There is no way to know who any violators are or the incremental effects of any violations. In formulating a plan, prior to finding an inter-district violation, the State would be groping in the dark. Third, such an order casts a poor light on the impartiality of the district court. Requiring time and money to be spent on an inter-district plan suggests that the court is predisposed to implementing it. In order not to waste the effort involved in formulating an inter-district plan, the court must first have to find an inter-district violation. It is unreasonable to require a plan for which no use has been estabilshed unless the court cares not about the due process rights to a fair hearing for those nonparties who are affected by such a plan.

VI. CONCLUSION

A summary reversal of the Court of Appeals' February 13, 1981, opinion should be entered with directions given to the Court of Appeals to strike all premature references it made to any inter-district remedy and to remand the case to a newly appointed district judge for

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3. It should be pointed out that dictating the use of State funds and in what amounts could present additional problems. See Note, Local Taxes, Federal Courts and School Desegregation in the Proposition 13 Era, 78 Mich. L. Rev. 587 (1980). Moreover, the State of Missouri presently has a serious cash problem which has required budget cutbacks in nearly all state agencies, and no raises to state employees including the faculty at the University of Missouri.

whatever further evidence the State of Missouri wishes to adduce on the issue of intra-district liability. All matters relating to any inter-district issues should be stricken from this case so that public confidence in fair and orderly procedures can be maintained.

Respectfully submitted,

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Dated: September 24th, 1981

APPENDIX

APPENDIX A

(Filed September 21, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of the United States to modify Order H(337)81 be and the same is granted in part and denied in part as set forth in the incorporated memorandum.

Dated this 21st day of September, 1981.

/s/ William Hungate
United States District Judge

(Filed September 21, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

MEMORANDUM

This matter is before the Court on H(360)81, the motion of the United States to modify Order H(337)81. For the reasons stated below, the motion to modify will be granted in part and denied in part.

On August 24, 1981, this Court entered its Order H(337)81, which, inter alia, provides that

> IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government imposed school segregation in the City of St. Louis and St. Louis County.

The United States now moves the Court to modify Order H(337)81 by striking the above-quoted portion or, in the alternative, by modifying the language to delete references to the United States, consistent wtih the following provisions of Judge Meredith's September 17, 1980, order.

> It appears to the Court that it is highly important that the efforts of the United States, the State, and the St. Louis Board of Education, heretofore developed with the cooperation of county school districts should be continued and intensified. This and other considerations indicate the advisability of changing timetables and certain aspects of the parties' participation in some of the programs which are the subject of subparagraphs (a) through (d) of paragraph 12.
>
> • • •
>
> 3. Paragraph 12(c) is hereby amended as to the following provisions: On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of interdistrict school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

On March 19, 1981, the United States Court of Appeals for the Eighth Circuit affirmed not only the provisions of paragraph 12(c) in Judge Meredith's September 17, 1980, Order, but also expressly declined to change its February 13, 1981, mandate that affirmed paragraph 12(c) as originally written.

After reviewing Judge Meredith's original and amended orders, the Court of Appeals held that

> The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that *the provisions of paragraph 12, both as originally written and as amended, must be enforced.* . . . In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations (citation omitted). Paragraphs 12(a) - (c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.
>
> The State of Missouri's motion [to stay the Court of Appeals' mandate dated February 13, 1981, or to stay enforcement of the district court's orders] is denied. We order prompt implementation of our mandate in *Liddell v. Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir., Feb. 13, 1981). (emphasis added).

Liddell v. Board of Educ., No. 80-1458, slip op. at 17 (8th Cir., Mar. 19, 1981).

In light of the Court of Appeals' adherence to its February 13, 1981, pronouncement concerning the legal responsibilities of the State of Missouri for the prompt de-

segregation of the St. Louis public school system, *id.* at 12, the request of the United States for deletion of the above-quoted portions of Order H (337) 81 will be denied.

In the alternative, the United States requests that the Court eliminate the United States from the reporting provisions of Order H(337)81.

Plaintiffs-intervenors Adams object to relieving the United States of any responsibilities under paragraph 12(c) as set forth in Judge Meredith's May 21, 1980, Order. Because the United States did not seek appellate review of the paragraph 12(c) reporting requirements, Adams asserts that this Court should not permit the United States now to avoid carrying out its obligations.

The State defendants support the United States' motion to terminate any reporting under paragraph 12(c) of the May 21, 1980, Order pending a trial on the merits of the recently filed amended complaint and cross-claim against the county school districts.

On February 13, 1981, the Court of Appeals took judicial notice that the City Board and Caldwell had filed amended complaints asking the district court to require interdistrict integration with the schools of St. Louis, St. Charles, and Jefferson Counties. Without expressing an opinion as to the merits of the proposed amendments, the Court of Appeals emphasized that

> the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the [desegregation] plan developed by the district court and approved by this Court including those sections of the plan that relate to inter-district integration [paragraphs 12(a)-(c)].

Liddell v. Board of Educ., No. 80-1458, slip op. at 10 (8th Cir., Feb. 13, 1981).

The Court cannot terminate the reporting provisions of paragraph 12(c) without disobeying the foregoing mandate of the United States Court of Appeals for the Eighth Circuit.

Notwithstanding the appellate court mandate, the State defendants argue that it is improper to order the preparation of a mandatory interdistrict remedy until such time as a constitutional violation has been found which in fact has an interdistrict effect. *See Swann v. Charlotte Mecklenberg Board of Educ.*, 402 U.S. 1 (1971) (emphasizing that the scope of the remedy is determined by the nature of the constitutional violation).

The Court of Appeals explicitly found that paragraph 12(c) of Judge Meredith's May 21, 1980, Order is within the authority of the district court to remedy segregation imposed by the State or other defendants. *Id.* at 19-20. The record is replete with evidence of discriminatory action and inaction by the State of Missouri. *See, e.g., Adams v. United States*, No. 79-1468, slip. op. at 7-8 (8th Cir., Mar. 3, 1980), setting forth the following historical background of this case:

> Prior to the Civil War, a Missouri statute provided: "No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State." Act of February 16, 1847, § 1, 1847 Mo. Laws 103. Beginning in 1865, the Missouri General Assembly enacted a series of statutes requiring separate public schools for blacks. *See, e.g.*, Act of February 17, 1865, § 13, 1865 Mo. Laws 226. This segregated system was incorporated into the Missouri Constitution of 1945, which specifically provided that separate schools were to be maintained for "white and colored children." *See* Mo. Const. art. IX, § 1(a) (1945). Although a 1954 Attorney General opinion declared this provision unenforceable following

> *Brown I*, it remained a part of the state constitution until repealed in 1976. Statutes implementing the constitutionally mandated segregation provided for separate funding, separate enumerations, separate consolidated "colored" school districts, and the interdistrict transfer of black students. Most of these statutes were not repealed until 1957. *See* Act of July 6, 1957, § 1, 1957 Mo. Laws 452.

See also Liddell v. Board of Educ., 491 F.Supp. 351, 359-60 (E.D. Mo. 1980).

In light of the Court's finding of unconstitutional segregation imposed by the state government and other defendants, the Court of Appeals stressed the legal obligation of the United States, the State of Missouri, and Board of Education to develop and implement the plans contemplated by paragraph 12 of Judge Meredith's May 21, 1980, Order. *Liddell v. Board of Educ.*, No. 80-1458, slip op. at 20, n.6 (8th Cir., Feb. 13, 1981) (mandating that "the district court countenance no excuse for further delay" in implementing the paragraph 12 plans).

The United States advises that it is always available to assist the Court upon request. The record indicates that since the United States intervened in this case in 1977, the federal government has consistently pursued a policy of assisting the State and local governments to devise plans to provide complete and lasting desegregation in the St. Louis public schools.

In contrast to its previous efforts to devise a desegregation remedy in cooperation with the city and county districts, the United States currently is not seeking a 12(c) interdistrict remedy. As a plaintiff-intervenor, the United States maintains that the obligation to develop a plan pursuant to paragraph 12(c) of Judge Meredith's orders is on the defendant State of Missouri and defendant Board of Education of the City of St. Louis.

Although the Court of Appeals stressed the obligation of the United States to comply with paragraph 12(c) of Judge Meredith's May 21, 1980, Order, the appeals court noted that no party had named the United States as a defendant and alleged that it engaged in discriminatory practices. *Id.* at 26.

Unless compelled to grant affirmative relief against the United States, the Court believes that the executive branch has a right to change its school desegregation policies. Therefore, the request of the United States to be relieved of its reporting responsibilities under Order H(337) 81 will be granted.

The City Board supports the portion of the motion of the United States to modify Order H(337)81 to reflect the changes made in paragraph 12(c) by Judge Meredith's Order dated September 17, 1980, *supra.*

The original version of paragraph 12(c) required the development of a plan to correct "the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." The City Board agrees with the government's assertion that the original version imposes an awkard limitation on the 12(c) planning process and submits that the problem was corrected in the amended version of paragraph 12(c), which required the development of a plan that would be "limited only by considerations of feasibility and practicality."

Adams rejects the position of the City Board as an attempt to interpose spurious delays in carrying out the original version of paragraph 12(c), which ordered that an interdistrict desegregation plan be presented to the Court sixteen months ago. Because the liability of the City Board and State has been determined by Judge Meredith and affirmed by the Court of Appeals, Adams contends that there is no legitimate reason to permit further delay in

addressing the scope of the remedy necessary to alleviate the remaining vestiges of government-imposed school segregation.

The City Board prefers to expand the original version of paragraph 12(c), which was limited to the City of St. Louis and St. Louis County, to include suburban school districts beyond St. Louis County. The Court has stayed its ruling until an evidentiary hearing may be held on expanding this litigation to include school districts in St. Charles and Jefferson Counties. The Court has also stayed discovery and claims against the school districts in St. Louis County that are voluntarily participating in a cooperative plan to achieve complete and lasting desegregation.

Having carefully considered paragraph 12(c) of Judge Meredith's Order dated May 21, 1980, as amended by his order dated September 17, 1980; the mandates of the United States Court of Appeals for the Eighth Circuit; the arguments of counsel; and the record as a whole, Order H (337) 81 will be amended to read as follows:

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's Order dated May 21, 1980, as amended and as affirmed by the United States Court of Appeals, that the State defendants and the Board of Education of the City of St. Louis are ordered and directed as follows:

> To develop and submit to the Court by February 1, 1982, a suggested plan for interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

Dated this 21st day of September, 1981.

/s/ William Hungate
United States District Judge

No. 80-2152

Office Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
and
EARLINE CALDWELL, *et al.*,
and
JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE, THE BOARD OF EDUCATION OF THE PARKWAY SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a school desegregation case, the State of Missouri can be ordered to develop and submit to the court plans for interdistrict school desegregation where affected suburban school districts are not parties to the case, where interdistrict relief was not sought by the parties, and where there has been no finding that any suburban school district is not operating a unitary school system nor that any suburban school district or the State of Missouri has intentionally committed racially discriminatory acts which have been a substantial cause of interdistrict segregation?

2. Whether compelling the State of Missouri to prepare plans for interdistrict school desegregation involving school districts which are not parties to the litigation violates the due process rights to notice and a hearing of those school districts?

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No. 80-2152

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

STATE OF MISSOURI, *et al.*,
Petitioners,
vs.
CRATON LIDDELL, *et al.*,
and
EARLINE CALDWELL, *et al.*,
and
JANICE ADAMS, *et al.*,
and
BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,
and
THE CITY OF ST. LOUIS, MISSOURI,
and
THE UNITED STATES OF AMERICA,
Respondents.

On Application for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE, THE BOARD OF EDUCATION OF THE PARKWAY SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS CURIAE

Amicus curiae, the Board of Education of the Parkway School District of St. Louis County, Missouri, respectfully prays that this Court issue a writ of certiorari sought by Petitioners, the State of Missouri, *et al.*, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 13, 1981. The consent of the attorneys for all parties in this case has been obtained, which consents have been filed separately with the Clerk's Office.

The interest of the Board of Education of the Parkway School District in this case arises from the fact that it is one of the school districts in St. Louis County, Missouri which has not yet been named as a party to the school desegregation suit pending in the United States District Court for the Eastern District of Missouri. Although not yet a party, the District Court's order of May 21, 1980, as amended, which was affirmed by the decision of the United States Court of Appeals for the Eighth Circuit sought to be reviewed by Petitioners, requires the State of Missouri and other parties to submit to the District Court plans for interdistrict school desegregation encompassing, at least, the 23 autonomous school districts in St. Louis County, Missouri. If these orders are not reviewed by this Court, it will allow the District Court to approve and implement the interdistrict plans which could result in the impositon of affirmative remedial obligations on the Parkway School District, without the Parkway School District ever having been found to have committed a constitutional violation justifying its inclusion in an interdistrict remedy.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to the petition for a writ of certiorari filed by the Petitioners. The opinion of the United States District Court for the Eastern District of Missouri is reported at 491 F. Supp. 351.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 13, 1981 and the Court of Appeals denied petitions for rehearing or rehearing en banc on March 19, 1981. A copy of the order denying the petitions for rehearing appears in Appendix B to the petition for a writ of certiorari filed by Petitioners. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This school desegregation case was begun in 1972, when Craton Liddell, his mother, and other members of the Concerned Parents of North St. Louis and their children ("the Liddell plaintiffs") filed a complaint in the United States District Court for the Eastern District of Missouri seeking to represent the class of school children and their parents in the St. Louis,

Missouri public school system. Named as defendants were the St. Louis City Board of Education ("the City Board"), its individual members and certain administrators. Plaintiffs alleged that defendants had "effected and perpetuated racial segregation and discrimination" in the operation of the public schools of the City of St. Louis, in violation of the Fourteenth Amendment.

After approximately one year of discovery proceedings, a class was certified. After some one and a half years of negotiation, the Liddell plaintiffs and the City Board entered into a consent decree which was approved by the District Court. Objections to the consent decree were filed by organizations representing St. Louis City teachers and by a second group of City students and parents ("the Caldwell group") who were joined by the St. Louis chapter of the National Association for the Advancement of Colored People. At this time, the Caldwell group also moved to intervene as parties plaintiff. The District Court denied the Caldwell group's motion to intervene and they appealed. The Court of Appeals reversed. *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976). Although the only issue presented to the Court of Appeals was whether the District Court erred in denying intervention, *id.* at 769, the Court of Appeals stated:

> In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken* v. *Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or unless district lines have been deliberately

> drawn on the basis of race. However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked.

Id. at 774 (citations omitted). This Court denied the City Board's petition for a writ of certiorari. *St. Louis Bd. of Education* v. *Caldwell*, 433 U.S. 914 (1977).

By various orders in 1977, the United States, the City of St. Louis, Janice Adams (representing the Concerned Parents for Neighborhood Schools), and Mary Puleo (representing the Involved Citizens Committee) were allowed to intervene as plaintiffs. Also during this time, the State of Missouri, the Commissioner of Education of the State of Missouri, and the State of Missouri Board of Education and its individual members were added as parties defendant.

The case proceeded to trial on questions of both liability and remedy. On April 12, 1979, the District Court rendered its decision and found no constitutional violation by any of the defendants. *Liddell* v. *Board of Education of St. Louis*, 469 F. Supp. 1304 (E.D. Mo. 1979). On appeal, the Eighth Circuit reversed and found that the City Board had failed to disestablish the dual school system it had maintained prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Specifically, the Court of Appeals held:

> The dual school system in St. Louis legally mandated before 1954 and perpetuated by the Board of Education's 1954-1956 desegregation plan, has been maintained and strengthened by the actions of the Board in the years since. The Board's steadfast adherence to a student assignment policy which did not desegregate the schools and its use of intact busing, school site selection, block busing, permissive transfers, and faculty assignments have preserved segregation in the school system.

Adams v. *United States*, 620 F.2d 1277, 1288 (8th Cir. 1980) (en banc).

Although the only question before the Court of Appeals was whether the City Board had effectively created and operated a unitary school system within the City of St. Louis, the Court of Appeals commented:

> Dr. Orfield [an expert witness testifying for the United States] agreed with the Board of Education that an inter-district remedy funded by the State of Missouri would have the best chance of permanently integrating the schools in the metropolitan St. Louis area.[27]

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27. Dr. Orfield testified:

> [T]he most stable kind of plan is a metropolitan-wide proportional enrollment plan * *.
>
> * * * * * * * *
>
> Anything that can be done to involve the suburban districts should be done.

In *Milliken* v. *Bradley*, 418 U.S. 717, 744-745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974), the Supreme Court stated that, in order for an inter-district remedy to be appropriate,

> it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

St. Louis County suburban school districts, pursuant to state law prior to *Brown*, collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools. *See* Act of April 9, 1917, 1917 Mo.

> Laws 498 (repealed 1957) (providing for the "Colored Consolidated High School District" of St. Louis County); Act of February 17, 1865, § 13, 1865 Mo. Laws 170 (repealed 1957) (providing, *inter alia,* for the inter-district transfer of "colored children"). Included among the pre-*Brown* practices of these districts was the assignment and transportation of black students living in the suburbs to black schools in the City. Moreover, as noted in Part VI of this opinion, governmental policies may have intensified segregation in the St. Louis area.

Id. at 1294-95 & n. 27 (citations omitted).

The Court of Appeals remanded the case to the District Court and ordered that the City Board submit a desegregation plan to the District Court and that, after a hearing, a desegregation plan was to be implemented in the City of St. Louis no later than the beginning of the 1980-81 school year. *Id.* at 1295. Only the Adams plaintiffs filed a petition for a writ of certiorari, which this Court denied. *Adams* v. *United States,* ____ U.S. ____, 101 S. Ct. 88, 66 L. Ed.2d 29 (1980).

The City Board timely submitted to the District Court its plan for desegregation of the St. Louis City public schools. On May 21, 1980, the District Court approved the plan, with minor modifications. *Liddell* v. *Board of Education,* 491 F. Supp. 351 (E.D. Mo. 1980). In paragraph 12 of its order approving the plan, the District Court stated:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the

desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F. Supp. at 353.

The District Court then addressed the liability of the State of Missouri and various state officials and agencies and concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected.

Id. at 360. The Court ordered the State to fund one-half of the desegregation budget, up to a maximum of eleven million dollars.

The State of Missouri and three parent groups appealed from the District Court order. The State of Missouri challenged the above-recited provisions of paragraph 12 of the District Court's May 21, 1980 order and argued that the District Court was without authority to order the preparation of interdistrict desegregation plans unless and until the affected school districts in St. Louis County are joined as parties to the lawsuit. The

Eighth Circuit rejected this argument and affirmed, finding that the interdistrict plan called for by a paragraph 12(a) was permissible because it is "voluntary" and that the interdistrict plan called for by paragraph 12(c) was permissible "to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation." *Liddell, et al.* v. *Board of Education, et al.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599, and 80-1735 (8th Cir. February 13, 1981) (Petition at A-15 to A-16).

While the appeal before the Eighth Circuit was pending, the Caldwell group and the City Board each filed motions in the District Court for leave to amend their pleadings to assert claims for interdistrict desegregation relief against some 40 separate and autonomous school districts in suburban St. Louis, St. Charles, and Jefferson Counties. To date, the District Court has not ruled upon these motions.

Also during the pendency of the appeal, the District Court modified paragraph 12(a)-(c) of its May 21, 1980 order to extend the time for filing the plans required to be submitted. In addition, the following paragraph was added to paragraph 12(c):

> On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, *and should specifically include*

pupil assignment and administrative reorganization provisions. (Emphasis added).

Petition at A-43.

By order of March 4, 1981, the District Court compelled the State Defendants to prepare a "voluntary" interdistrict plan pursuant to paragraph 12(a) of the District Court's May 21, 1980 order within 60 days or face the possibility of being held in contempt of court. Further, the District Court said that if the "voluntary" plan is not submitted, "[t]his Court will be left no alternative but to adopt a plan *to remedy the effects of constitutional violations.*" Petition at A-59 to A-60 (emphasis added).

On May 4, 1981, the City Board and the United States Department of Justice filed a joint plan for voluntary interdistrict desegregation and the State of Missouri filed a similar, but separate, voluntary plan. The Court has yet to rule on such plans.

On May 11, 1981, hearings were begun on the issues relating to the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the City Board. The parties have presented a consent decree relating to the Special School District and paragraph 12(b), the terms of which have been approved by the District Court as a vocational plan under paragraph 12(b). Petition at A-65 *et seq.*

The State of Missouri and the various individual defendants who are officials of the State of Missouri (collectively, "the State Defendants") have filed a petition for a writ of certiorari to review the Eighth Circuit's decision. Six days after the State Defendants served their petition, the District Court entered an order (reproduced in Appendix B hereto) terminating the reporting requirements under paragraph 12(c). This order was in response to a motion filed by the Caldwell group some four months ealier (reproduced in Appendix A hereto).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Decision In *Milliken* v. *Bradley*, 418 U.S. 717 (1974)

In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), this Court first addressed the question of when a District Court may properly impose a desegregation remedy encompassing more than one school district. A brief review of the facts in *Milliken* will show that case to be essentially identical to the facts presented in the instant case.

In *Milliken*, plaintiffs had filed a class action against the Board of Education of the City of Detroit, the Governor of Michigan, the Attorney General, the State Board of Education, and the State Superintendent of Public Instruction, and alleged that the public school system of the City of Detroit was segregated on the basis of race. The complaint sought injunctive relief which would eliminate the racially dual school system maintained in the City of Detroit. After a trial, the District Court found that governmental actions at all levels, federal, state and local, and combined to establish a pattern of residential segregation throughout the metropolitan Detroit area. The court further found that the Detroit Board of Education had created and maintained optional attendance zones, had otherwise created school attendance zones, and had engaged in school construction practices, all of which had the natural and foreseeable effect of creating and maintaining school segregation within the City of Detroit. The court further found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education. For example, the State was found to have failed to provide funds for transportation of pupils within Detroit while it had provided many neighboring, mostly white, school districts with a full range of transportation services. The court also found that the State had acted to delay and impede school desegregation in Detroit by enacting legisla-

tion which delayed implementation of a desegregation plan voluntarily adopted by the Detroit Board of Education and by prescribing criteria for "free choice" and "neighborhood schools" which, the court determined, had both the purpose and effect of maintaining segregation in the Detroit school system.

As to the question of an appropriate remedy, the court ordered the Detroit Board of Education to submit a desegregation plan limited to the City of Detroit, but also ordered the State defendants to submit a desegregation plan encompassing the three-county metropolitan area. Thereafter, the court granted the motions to intervene filed by many of the suburban school districts which would be affected by a metropolitan-wide remedy. The intervenors were not allowed to assert any claim or defense previously asserted, were not allowed to reopen any issue previously determined, and were limited to filing objections, modifications, or alternatives to the metropolitan plan to be filed by the State defendants. The court then rejected a Detroit-only plan because it found such a plan would contribute to the perception of the Detroit school system as a one-race system. After hearings confined to "the size and expanse of the metropolitan plan," the court approved a "desegregation area" encompassing the Detroit school district and 53 suburban school districts, appointed a panel to submit "an effective desegregation plan" for the entire desegregation area, but did not specifically approve a particular interdistrict plan.

The District Court's decisions were affirmed in substantial part by a divided Court of Appeals. *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973) (en banc). This Court granted certiorari and reversed.

This Court reaffirmed its earlier statement in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971) that "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 418 U.S. at 738. Ap-

plying this general principle, the Court formulated the following standard for when interdistrict desegregation relief may be ordered:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.
>
> The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court.

418 U.S. at 744-45 (citation omitted).

The Court then went on to review certain language and incidental findings in the record which had been relied upon by the District Court and the Court of Appeals to justify the interdistrict relief. These included: (1) the State being held derivatively liable for the acts of the Detroit school board; (2) a predominately black suburban school had contracted to have black students transported to a predominately black high school in Detroit with the "tacit or express" approval of the State; (3) the state legislation rescinding the voluntary desegregation plan adopted by the Detroit school board; (4) the State's authority to supervise selection and approve construction of school facilities; and (5) financial limitations allowing suburban districts to make larger per pupil contributions thus perpetuating educational inequality.

The Court rejected these findings, collectively and individually, as being inadequate to justify an interdistrict remedy. The Court concluded:

> This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge was concerned with a foundation for interdistrict relief.

418 U.S. at 752 (footnote omitted).

This Court's rationale in *Milliken* compels the conclusion that the District Court and the Eighth Circuit misapplied existing law in ordering and approving the preparation of plans for an interdistrict remedy. As in *Milliken,* the following facts are present in the instant case: (1) the complaints filed sought relief only in the St. Louis City public school system; (2) the case was tried solely on a theory seeking relief limited to the St. Louis City public schools; (3) certain state agencies were parties to the pro-

ceeding and were found to be at least partially liable for the segregated condition of the St. Louis public school system; (4) no finding has been made that the State or any St. Louis County school district has committed any constitutional violations which have had an interdistrict effect; and (5) despite the foregoing, the State of Missouri has been ordered to prepare plans for interdistrict desegregation encompassing, at least, the 23 autonomous school districts in St. Louis County. The only relevant factual difference between *Milliken* and the instant case is that in *Milliken* the suburban school districts became parties to the case prior to the date the interdistrict remedy was ordered: in the instant case, none of the school districts in St. Louis County was made a party to the case prior to the order requiring submission of the interdistrict plans. Indeed, to date, only the Special School District of St. Louis County has been named as a party and that occurred only after the District Court ordered the submission of a plan to merge or consolidate the vocational programs of that district with the St. Louis City School District, to be implemented during the 1981-82 school year.

It is submitted that this conflict with the Court's decision in *Milliken* v. *Bradley* justifies the grant of certiorari to review the judgment below.[1]

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[1]It may be argued that because the District Court has not adopted particular interdistrict plans, *Milliken* is somehow inapposite. However, it should be remembered that no particular interdistrict plan was adopted in *Milliken*. *Bradley* v. *Milliken, supra,* 484 F.2d at 218. Furthermore, if there were ever any doubts that the plans required by paragraph 12(a)-(c) are designed to be implemented, and implemented quickly, they were dispelled by the Eighth Circuit's February 13, 1981 opinion where the court stated:

> We take judicial notice of the fact that the Board of Education and one of the parent groups have filed amended complaints in the district court, asking the court to require interdistrict integration with the schools of St. Louis, St. Charles and Jefferson Counties. We express no opinion as to the merits of

2. The Decision Below Raises Series Questions As To The Proper Exercise Of Federal Judicial Power In Relation To State And Local Governments

The interdistrict remedial plans called for by paragraph 12 have been ordered in spite of the fact that the school districts in

---

> the proposed amendments. *We do, however, emphasize that the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration.*

Liddell, et al., v. *Board of Education, et al., supra*, slip. op. at 10 (Petition at A-7) (emphasis added).

Furthermore, it may be argued that any questions relating to the propriety of paragraph 12(c) are now moot in view of the District Court's order of June 23, 1981 (Appendix B hereto), which terminated further reporting requirements under paragraph 12(c). Even disregarding any inferences that arise from the somewhat unusual timing of the order (filed six days after the State Defendants' petition was served), it is clear that the order merely suspends the reporting requirements and does not bring an end to proceedings under paragraph 12(c). Indeed, the order clearly comtemplates further proceedings:

> This Court retains jurisdiction of this matter for all purposes, including entry of such additional orders as may, from time to time, be necessary and proper related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended.

Moreover, this order further reinforces the arguments made in support of the State Defendants' unsuccessful application for a stay, *Missouri* v. *Craton Liddell*, ___ U.S. ___, 68 L.Ed.2d 290 (No. A-825, April 20, 1981), that paragraph 12(c) is being used as a coercive device to compel participation in a "voluntary" plan by St. Louis County school districts. Thus, until such time as paragraph 12(c) is entirely stricken, its coercive impact on St. Louis County school districts continues unabated. It is suggested that this "on again, off again" "carrot and stick" treatment of paragraph 12(c) should not shield the decision below from review. *Cf. United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case. . . . A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (Emphasis added).

St. Louis County have not had any opportunity to present evidence relating to whether they have committed any constitutional violations having an interdistrict effect. Such proceedings raise substantial questions as to the appropriate role of the federal judiciary in relation to the operation of state and local government entities. In *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 410 (1977), this Court stated:

> [T]he case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.

In complete disregard of this standard, the sole factual finding supporting the District Court's conclusion that the State Defendants are "primary constitutional wrongdoers" reads as follows:

> 12. The State of Missouri, which together with State officials and the State Board of Education was joined as a defendant, is jointly and severally liable with the defendant Board for the costs pertaining to the Desegregation Plan. The State of Missouri, which prior to 1954 mandated school segregation, never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy. The State of Missouri is liable for the de jure segregation which existed in the St. Louis Public Schools. Thus, as recognized in the Court of Appeals opinion, it is within the equitable power of this Court to require the State to pay a portion of the costs of desegregation. In the light of the financial position of the district, the nature of the violations committed by the parties, and all the appurtenant circumstances, it is appropriate that the State be required to pay one-half of the total costs to implement the Desegregation Plan for the public schools of the City of St. Louis.

491 F.Supp. at 357.

Similarly, the sole factual finding supporting the order to prepare a plan for the merger or consolidation of the vocational programs of the Special School District of St. Louis County with the St. Louis City School District reads as follows:

> 17. The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound nor administratively efficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated.

Id. at 358.

Similarly, the statement of the Court of Appeals that St. Louis County school districts "collaborated with each other and with the City of St. Louis to ensure the maintenance of segregated schools" is based solely on the existence of state statutes enacted in 1865 and 1917 (both of which were repealed in 1957) which mandated racial segregation in schools and on the alleged transportation of an unspecified number of black students residing in unspecified areas in St. Louis County to unspecified schools in the City of St. Louis at some unspecified time prior to *Brown*. *See* 620 F.2d at 1294-95 n. 27.

These statements, which have no articulated evidentiary basis in the record and which go well beyond the issues pleaded in this case, reflect a serious disregard for the adjudicative principles established by *Dayton*.

In short, the only theory asserted in support of an interdistrict remedy is that the State of Missouri maintained segregated schools by law prior to 1954 and that the State "failed to disestablish" those segregated schools in the City of St. Louis.

Such a theory, if upheld by this Court, would justify the imposition of interdistrict remedies in any state which mandated racial segregation in schools prior to 1954, so long as any single school district in that state is found to have failed to have created a unitary school system within its own boundaries. Not only is such a theory patently inconsistent with this Court's decision and rationale in *Milliken*, it would also allow federal courts to reorganize the entire educational system of a state based on a merely localized constitutional violation.[3]

It is respectfully suggested that the decision below constitutes such a cavalier intrusion on the operation of state and local governments and presents such sufficiently serious questions of comity and the exercise of the powers of the federal judiciary as to warrant review by this Court.

3. The Decision Below Raises Serious Questions As To Due Process Rights Of Persons Who Are Not Parties To Litigation

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[3]Even disregarding the interdistrict aspects of this litigation, it is clear the decision below was rendered in violation of well-established principles governing school desegregation cases. As noted above, the only basis on which the State's liability was predicated was its "failure to disestablish" the segregated schools in the City of St. Louis. Such a "failure to disestablish" theory has previously been utilized by this Court only in regard to the liability of local school districts which exercise day-to-day control over educational affairs. *E.g., Dayton Bd. of Education* v. *Brinkman,* 443 U.S. 449 (1979), *Green* v. *County School Board,* 391 U.S. 430 (1968). A finding of liability as to a state, which does not control the day-to-day operation of local school districts, has been upheld only where there has been a showing of *affirmative* segregative action by the state. *E.g., Milliken* v. *Bradley,* 433 U.S. 267, 269 n. 1 (1977)(State of Michigan enacted legislation delaying implementation of voluntary desegregation plan in Detroit). Not only did the decision below fail to find any affirmative segregative action by the State of Missouri, it completely failed to discuss whether the State's action or inaction was the result of a purposeful intention to segregate on the basis of race, a prerequisite to any finding of an equal protection violation. *Washington* v. *Davis,* 426 U.S. 229, 242 (1976).

At the time the District Court's May 21, 1980 order was entered, no St. Louis County school district was a party to the case. Only after the District Court's order was appealed was the Special School District made a party to the proceedings in the District Court. None of the 23 autonomous St. Louis County school districts has been made a party or been allowed to present evidence or objections relating to its liability or relating to the remedy requiring the preparation of plans for interdistrict school desegregation.

In *Milliken,* this Court found it unnecessary to decide whether the limited role afforded the suburban Detroit school districts in contesting the interdistrict plan violated their due process rights. 418 U.S. at 752. Similarly, if this Court should determine that the decision below was rendered in violation of the standards for interdistrict relief established in *Milliken,* it may be unnecessary to determine whether the decision below violated the due process rights of the St. Louis County school districts. Nevertheless, the decision below raises basic questions as to when a federal court may order the dismantling or reorganization of state or local government entities without allowing those entities an opportunity to appear and defend their interests.

This Court has on many occasions emphasized the importance of the fundamental due process protections of notice and a right to a fair and impartial hearing guaranteed by the Fifth Amendment to the United States Constitution:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of a case. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950).
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> A fundamental requirement of due process is "the opportunity to be heard" . . . It is an opportunity which must

be granted at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

There can be no doubt that the school districts in St. Louis County have never been afforded notice or any opportunity to be heard in relation to the preparation of the interdistrict school desegregation plans.

It is submitted that the decision below constitutes such a radical departure from the accepted and usual course of judicial proceedings and long-established principles of procedural due process as to call for an exercise of this Court's supervisory powers.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

The undersigned has been authorized to represent that attorneys for the Pattonville, Ritenour, Rockwood, Webster Groves, and Riverview Gardens school districts in St. Louis County, Missouri concur in the request that the writ of certiorari issue in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action
No. 72-100 C(4)

Craton Liddell, et al.,
Plaintiff,

v.

The Board of Education of the City of St. Louis, Missouri, et al.,
Defendants.

CALDWELL PLAINTIFFS-INTERVENORS' MOTION TO TERMINATE FURTHER REPORTING UNDER PARAGRAPH 12(c) OF THE COURT'S ORDER OF 21 MAY 1980, AS AMENDED BY ORDER OF 17 SEPTEMBER 1980

The Caldwell plaintiffs-intervenors respectfully move the Court to enter an order terminating further reporting pursuant to paragraph 12(c) of this Court's order of 21 May 1980, as amended by the Court's order of 17 September 1980. In support of this motion, plaintiffs-intervenors show the Court as follows:

1. By paragraph 12(c) of the Court's 21 May order, the United States, the State defendants and the defendant St. Louis Board were required to develop "a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." By order of 17 September 1980 the Court amended the paragraph 12(c) requirement as follows: "On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall

prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation."

2. The Caldwell plaintiffs-intervenors were the principal proponents of paragraph 12 of the 21 May order, including paragraph 12(c) thereof. It was and is the position of plaintiffs-intervenors, supported by the findings and orders of this Court and the recent opinion of the Court of Appeals, that the desegregation plan heretofore approved for the City of St. Louis is inadequate to dismantle the remaining vestiges of government-imposed segregation from the St. Louis school district. It was and is plaintiffs-intervenors' understanding that paragraph 12(c) was designed to force the government wrongdoers in this case to continue to address the means necessary for eradicating these remaining vestiges of government-imposed segregation. It has also been the consistent position of plaintiffs-intervenors, however, that, despite the adjudicated findings of remaining vestiges of government-imposed racial dualism, no mandatory plan of inter-district desegregation can be ordered on the basis of the findings and the record as they now stand, for the simple reason that the Court and the parties have not yet addressed themselves to the interdistrict impact of such remaining vestiges.

3. On the basis of the numerous filings of the State defendants in this Court and in the Court of Appeals, the *amicus* briefs submitted by various proposed suburban school district defendants, conversations with counsel for the parties, including counsel for the State defendants, and conversations with the chairperson of the Desegregation Monitoring and Advisory Committee, plaintiffs-intervenors have determined that paragraph 12(c) is now operating as a perceived impediment to efforts to develop a voluntary plan of interdistrict desegregation pursuant to paragraph 12(a) of the 21 May order. The chairperson of the Monitoring Committee has requested, and the St.

Louis Board and the Caldwell plaintiffs-intervenors have generally agreed to, a two-month hiatus in the "interdistrict" phase of this litigation in order to facilitate development of a voluntary plan pursuant to paragraph 12(a). Although plaintiffs-intervenors do not believe that paragraph 12(c), properly understood, creates any actual obstacle to development of a paragraph 12(a) plan, we recognize that it is widely perceived as such. And while we remain skeptical as to the potential for paragraph 12(a) efforts to produce actual and meaningful desegregation, we have determined that such chances as there are will be facilitated by the termination of the requirements of paragraph 12(c).

4. We believe that the requirements or paragraph 12(c) have been satisified by one of the government parties to whom it was directed: the defendant St. Louis Board of Education. As stated above, the principal purpose of paragraph 12(c) was to force the government wrongdoers to continue to assess and address the nature and extent of their unconstitutional conduct, and the means of remedying same. The St. Louis Board has clearly fulfilled that purpose by its motions of 9 January 1981 for leave to add parties and to cross-claim for interdistrict desegregation; the obligations of the United States under paragraph 12(c) were eliminated by the Court's order of 17 September 1980; and the State defendants have determined to litigate the question of the interdistrict impact of their constitutional violation. In these circumstances, and in light of the interpretation placed upon paragraph 12(c) by the Court of Appeals' opinion of 13 February (slip op. 19-20), there is nothing further to be gained by additional reporting under paragraph 12(c), and it appears, at least from the perceptions of the adverse parties, that elimination of paragraph 12(c)'s requirements will facilitate efforts to achieve a voluntary plan of inter-district desegregation pursuant to paragraph 12(a).

WHEREFORE, for the foregoing reasons, the Caldwell plaintiffs-intervenors respectfully request the Court to enter an

order terminating the need for further proceedings under paragraph 12(c) of the Court's order of 21 May 1980, as amended.

Dated: 26 February 1981

Respectfully submitted,

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education of the City of St. Louis,
State of Missouri, et al.,
Defendants.

ORDER

This matter is before the Court on the parties' separate motions related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended. To expedite ongoing efforts to design a voluntary, cooperative desegregation plan in compliance with the mandate of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that the motion to Terminate Further Reporting Under Paragraph 12(c) filed by Caldwell plaintiffs-intervenors on February 27, 1981, H(8)81, be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the post hearing motion to terminate 12(a) hearing and to commence 12(c) proceedings filed by Liddell plaintiffs, H(155)81, be and the same is denied.

This Court retains jurisdiction of this matter for all purposes, including entry of such additional orders as may, from time to

time, be necessary and proper related to paragraphs 12(a) and 12(c) of Judge Meredith's order dated May 21, 1980, as amended.

Dated this 23rd day of June, 1981.

/s/ WILLIAM L. HUNGATE
UNITED STATES DISTRICT
JUDGE